

**ANGLIA RUSKIN UNIVERSITY**

**Hybrid Corporate Governance:  
A Choice for Poland?**

**Katarzyna Anna Samól**

A dissertation in partial fulfilment of the requirement of  
Anglia Ruskin University for the degree of Doctor of  
Philosophy

Submitted: August 2014

# ACKNOWLEDGMENTS

My thanks must go to my supervisor, Dr Rhidian Lewis, for his support, advice and patience over the past three years. I have learned a great deal from Dr Lewis during the course of my research.

I wish to express my gratitude to Professor Robert Home for looking after the administrative aspects of my PhD so well, and his encouragement.

I am very thankful to researchers from Wrocław University for their assistance. In particular, I would like to mention Professor Piotr Machnikowski. I am impressed with his professionalism.

To my friends and legal critics, Ania and Marek, for guiding me bravely throughout my research. Their advice and explanations shaped and improved this thesis.

To my family members for arranging for me almost forty (!) interviews with business practitioners.

To all my interviewees for dedicating their precious time to me.

Finally:

To my parents for their financial support during my PhD studies, and caring about my legal education, keeping me subscribed me to various legal journals in Poland.

To my sister for editing tables and charts for my thesis, and filling my bookshelves with life inspiring literature.

To grandma Jania who keeps telling me to follow my heart in life, and to never give up.

To my late friend – great advisor and former literature teacher – Professor Janina Duszeńko, for providing me at various times with support, encouragement and inspiration. Janina convinced me that I should never lower my standards, despite life circumstances, and that the only meaningful way of life is to make it a great adventure. I am unspeakably grateful to her for that.

To one more Person who moved heaven and earth to help me over the last three years. He knows my every thought, so there is no need to mention His name here.

I couldn't have done it without you, guys!

**HYBRID CORPORATE GOVERNANCE: A CHOICE FOR POLAND?**

KATARZYNA ANNA SAMÓŁ

August 2014

The purpose of the research investigation is to consider the potential opportunities through which corporate governance may be developed to better suit the developing commercial culture within Poland.

In order to do this, I formulate the following research questions: 'What are the weaknesses of the Polish corporate governance system?', 'What changes should be made to corporate governance in Poland?', and 'Is a hybrid corporate governance model a choice for Poland?'

The concept of hybridisation is fairly new, and involves combining different approaches to corporate governance, eg it embraces combining elements of the board management and monitoring models.

I examine several changes to corporate governance that can be called hybrid. They were implemented in South Africa, Japan, Malaysia, the UK and the US. The main focus, however, is put on Polish corporate governance, which I investigate from the angle of those changes.

Doctrinal research is combined with a set of interviews conducted with business practitioners in Poland. Interviewees are asked to express their opinion about corporate governance in Poland. Questions are asked in the context of changes that were made to corporate governance in countries mentioned above.

The interviews produce results that overlap with the doctrinal research. Polish companies have a highly consolidated share ownership structure, which has a negative influence on the allocation of power between corporate organs. The supervisory board is an organ through which the controlling shareholders extend their power. Under the Company Code 2000, the supervisory board usually appoints and removes members of the management board, and instructs them in the decision making process. The statutes might give a broader scope of powers to the supervisory board. All this results in various forms of expropriation in companies, such as, for example, stealing of profits by governing bodies, overpaying executives, or installing unqualified family members in managerial positions.

In general, interviewees are pleased with the currently binding corporate governance in Poland. The majority of them are pessimistic about implementing such large changes in Poland as, for example, a one-tier board system. A significant number of interviewees propose minor changes to the Polish system of corporate governance.

It should be highlighted that several non-managerial interviewees turn out to have more liberal approaches to potential changes to corporate governance in Poland.

The research fills a gap in knowledge on hybrid corporate governance, as this issue has hardly been touched by the Polish legal doctrine. It also systematises and develops knowledge on hybrid corporate governance worldwide, and develops knowledge on legal transplant.

Key words: hybrid corporate governance, corporate governance, legal transplant

# TABLES OF CONTENTS

ACKNOWLEDGMENTS .....	I
ABSTRACT .....	II
TABLES OF CONTENTS .....	III
LIST OF FIGURES.....	VII
LIST OF TABLES.....	VIII
LIST OF CHARTS.....	IX
LIST OF LEGISLATION .....	X
LIST OF CASES .....	XII
LIST OF APPENDICES.....	XIII
ABBREVIATIONS OF TERMS .....	XV
COPYRIGHT DECLARATION .....	XVII
<b>I. INTRODUCTORY REMARKS .....</b>	<b>- 1 -</b>
<b>II. RESEARCH METHODOLOGY.....</b>	<b>- 13 -</b>
<b>A. INTRODUCTION.....</b>	<b>- 13 -</b>
<b>B. RESEARCH DESIGN: DOCTRINAL, NON-DOCTRINAL AND COMPARATIVE RESEARCH -</b>	<b>13 -</b>
1. Doctrinal approach to research and its application to corporate governance .....	- 13 -
2. Non-doctrinal approach to research and its application to corporate governance .....	- 14 -
a) Interviews.....	- 15 -
b) Observations.....	- 16 -
3. Comparative research and its application to corporate governance .....	- 17 -
<b>C. RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE AND MIXED METHODS RESEARCH -</b>	<b>19 -</b>
1. Qualitative research and its application to corporate governance .....	- 19 -
a) Phenomenological inquiry .....	- 20 -
b) Hermeneutical inquiry .....	- 20 -
c) Narrative inquiry .....	- 22 -
d) Case studies .....	- 22 -
e) Ethnography.....	- 23 -
f) Grounded theory .....	- 24 -

2. Quantitative research and its application to corporate governance .....	25 -
3. Mixed method approach and its application to research on corporate governance .....	27 -
<b>D. COLLECTION AND AN ANALYSIS OF DATA ON CORPORATE GOVERNANCE.....</b>	<b>29 -</b>
1. Data collection .....	29 -
2. Data analysis .....	31 -
<b>E. ETHICS IN RESEARCH ON CORPORATE GOVERNANCE.....</b>	<b>32 -</b>
<b>F. CONCLUSIONS .....</b>	<b>33 -</b>
<b>III. LITERATURE REVIEW.....</b>	<b>34 -</b>
<b>A. INTRODUCTION.....</b>	<b>34 -</b>
<b>B. THE NOTION OF HYBRID CORPORATE GOVERNANCE .....</b>	<b>35 -</b>
1. The Andreasson definition of hybrid corporate governance.....	35 -
2. Alternative definitions of hybrid corporate governance .....	39 -
3. Legal transplant .....	41 -
4. The definition of corporate governance .....	42 -
<b>C. HYBRID CORPORATE GOVERNANCE IN POLAND .....</b>	<b>44 -</b>
<b>D. HYBRIDISATION OF CORPORATE GOVERNANCE IN SOUTH AFRICA.....</b>	<b>47 -</b>
1. The 'stakeholder inclusive' model .....	47 -
2. The 'apply or explain' principle.....	49 -
3. Boardroom according to King III .....	52 -
<b>E. HYBRID CORPORATE GOVERNANCE IN JAPAN .....</b>	<b>53 -</b>
1. The new approach to shareholders .....	53 -
2. Boardroom reforms .....	57 -
<b>F. THE UNIQUE SYSTEM FOR TRAINING DIRECTORS IN MALAYSIA.....</b>	<b>62 -</b>
<b>G. THE DISCLOSURE SYSTEM IN SINGAPORE.....</b>	<b>64 -</b>
1. The switch from merit-based regulation to a disclosure-based system .....	64 -
2. The way forward .....	69 -
<b>H. CONCLUSIONS.....</b>	<b>71 -</b>
<b>IV. CORPORATE GOVERNANCE IN THE UNITED STATES AND THE UNITED KINGDOM ...</b>	<b>73 -</b>
<b>A. INTRODUCTION.....</b>	<b>73 -</b>
<b>B. 'COMPLY OR ELSE' VS 'COMPLY OR EXPLAIN' .....</b>	<b>74 -</b>
<b>C. SHAREHOLDER VALUE .....</b>	<b>78 -</b>
<b>D. THE BOARD STRUCTURE .....</b>	<b>80 -</b>
1. Chief executive officer vs chairman .....	81 -
2. The independence of non-executive directors .....	84 -
3. Board diversity .....	89 -

<b>E. DIRECTORS' PERFORMANCE AND REMUNERATIONS.....</b>	<b>- 92 -</b>
<b>F. THE DISCLOSURE OF DIRECTORS' REMUNERATION .....</b>	<b>- 94 -</b>
<b>G. CONCLUSIONS.....</b>	<b>- 97 -</b>
<b>V. CORPORATE GOVERNANCE IN POLAND.....</b>	<b>- 99 -</b>
<b>A. INTRODUCTION.....</b>	<b>- 99 -</b>
<b>B. THE CORPORATE GOVERNANCE OUTLINE.....</b>	<b>- 99 -</b>
<b>C. THE OWNERSHIP STRUCTURE .....</b>	<b>- 101 -</b>
<b>D. THE CONCENTRATION OF CORPORATE CONTROL.....</b>	<b>- 103 -</b>
1. Reasons for the high concentration of corporate control .....	- 103 -
2. Reasons for the high concentration of corporate control maintenance .....	- 105 -
<b>E. THE INSIDE STRUCTURE AND DISTRIBUTION OF POWERS.....</b>	<b>- 107 -</b>
1. The management board .....	- 107 -
2. Directors' duties.....	- 109 -
3. The shareholders' meeting .....	- 113 -
4. The supervisory board .....	- 114 -
5. The independence of supervisors .....	- 117 -
6. Other board issues .....	- 119 -
<b>F. REMUNERATION POLICY .....</b>	<b>- 121 -</b>
<b>G. THE DISCLOSURE SYSTEM.....</b>	<b>- 124 -</b>
<b>H. CONCLUSIONS.....</b>	<b>- 125 -</b>
<b>VI. ANALYSIS OF INTERVIEWS .....</b>	<b>- 126 -</b>
<b>A. INTRODUCTION.....</b>	<b>- 126 -</b>
<b>B. CONCENTRATED OWNERSHIP AND CONTROL IN POLAND.....</b>	<b>- 127 -</b>
<b>C. THE SUPERVISORY BOARD IN POLAND .....</b>	<b>- 131 -</b>
1. The scope of power .....	- 132 -
2. The independence of supervisors .....	- 134 -
<b>D. THE ONE-TIER BOARD SYSTEM IN POLAND .....</b>	<b>- 137 -</b>
<b>E. LEGAL TRANSPLANT IN POLISH CORPORATE GOVERNANCE.....</b>	<b>- 141 -</b>
<b>F. OTHER BOARD ISSUES.....</b>	<b>- 144 -</b>
1. Board committees on the supervisory board .....	- 144 -
2. Employees and bank representatives on supervisory boards in Poland .....	- 147 -
3. Gender diversity within corporate governance in Poland .....	- 151 -
4. Obligatory training for board members in Poland .....	- 152 -

<b>G. ENLIGHTENED SHAREHOLDER VALUE IN POLAND.....</b>	<b>- 154 -</b>
<b>H. REMUNERATION POLICY IN POLAND .....</b>	<b>- 155 -</b>
<b>I. THE DISCLOSURE SYSTEM IN POLAND .....</b>	<b>- 159 -</b>
<b>J. THE ‘COMPLY OR EXPLAIN’ PRINCIPLE IN POLAND .....</b>	<b>- 160 -</b>
<b>K. CONCLUSIONS.....</b>	<b>- 162 -</b>
<b>VII. CONCLUDING REMARKS .....</b>	<b>- 164 -</b>
<b>BIBLIOGRAPHY.....</b>	<b>- 186 -</b>
<b>APPENDICES.....</b>	<b>- 209 -</b>

## LIST OF FIGURES

<b>Figure 1.</b> Questions for research on corporate governance in Poland	10
<b>Figure 2.</b> Objectives of the research project	11
<b>Figure 3.</b> Research methodology applied to corporate governance	18
<b>Figure 4.</b> Methodology rejected in research on corporate governance	28
<b>Figure 5.</b> Data collection scheme applied to research on corporate governance	29
<b>Figure 6.</b> Comparative analysis applied to research on corporate governance	31
<b>Figure 7.</b> Components of hybrid corporate governance according to Andreasson	39



## LIST OF TABLES

<b>Table 1.</b> Shareholder ownership in Japan	56
<b>Table 2.</b> Organizational structure of Tokyo Stock Exchange first section (%)	59
<b>Table 3.</b> Adoption ratio and the average number of outside directors of Tokyo Stock Exchange-listed companies ( <i>kansayaku</i> companies; foreign shareholder ratio)	60
<b>Table 4.</b> Corporate governance in Poland	100

## LIST OF CHARTS

<b>Chart 1.</b> Participation of women on supervisory boards in Poland	121
<b>Chart 2.</b> Opinions on the independence of supervisory board members in Poland	136
<b>Chart 3.</b> Opinions on the possibility of implementing an alternative board system in Poland	138
<b>Chart 4.</b> Employees on supervisory boards in Poland	148
<b>Chart 5.</b> Opinions on setting a remuneration policy in Poland	157
<b>Chart 6.</b> Relationships between the remuneration of members and presidents of supervisory boards to members and presidents of management boards	158

# LIST OF LEGISLATION

## COMPULSORY LAW

- Act of 15 September 2000 on the Commercial Partnerships and Companies – Journal of Laws of 2000, No. 94, item 1037
- Act of 30 August 1996 on Commercialisation and Privatisation of State-Owned Enterprises – Journal of Laws of 2002, No. 171, item 1397
- Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies – 2004/913/EC
- Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector – 2009/385/EC
- Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board – 2005/162/EC
- UK Companies Act of 2006 (c 46)
- Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) – Official Journal L 294 , 10/11/2001 P. 0001 – 0021
- Directive 2006/43/EC of the European Parliament and the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC
- The Dodd–Frank Wall Street Reform and Consumer Protection Act – Pub.L. 111–203, H.R. 4173
- German Stock Corporation Act of 2010 (*Aktiengesetz*)
- Act of 19 October 1991 on Management of Agriculture Property of the Treasury – Journal of Laws of 1991, No. 107, item 464
- Act of 30 April 1993 on National Investment Funds – Journal of Laws of 1993, No. 44, item 202
- Act of 13 July 1990 on Privatisation of State-Owned Enterprises – Journal of Laws of 1990, No. 51, item 298
- Act of 29 July 2005 on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and on Public Companies – Journal of Laws of 2005, No. 184, item 1539
- Regulation of the Minister of Finance of 19 February 2009 on the current and periodic disclosures to be made by issuers of securities and conditions for recognition as equivalent of information where disclosure is required under the laws of a non-member state

- Sarbanes-Oxley Act of 2002 – Pub.L. 107–204, 116 Stat. 745
- Act of 18 March 2010 on Special Rights of the Minister of the Treasury of State as Well as on Their Implementation for Capital Companies and Group of Companies in Energy, Petroleum and Gas Petrol Sector – Journal of Laws of 2010, No. 65, item 404
- Act of 3 June 2005 on Special Rights of the State Treasury and on Their Execution in Capital Companies of Material Significance for the Public Order and the Public Safety – Journal of Laws of 2005, No. 132, item 1108
- Act of 25 September 1981 on State-Owned Enterprises – Journal of Laws of 1981, No. 24, item 122
- Act of 7 May 2009 on Statutory Auditors, Their Self-Governing Organisation, Entities Authorised to Audit Financial Statements and on Public Oversight – Journal of Laws of 2009, No. 77, item 649
- Treaty on European Union and the Treaty on the Functioning European Union – Official Journal C 326, 26/10/2012 P. 0001 – 0390

#### **VOLUNTARY LAW**

- King Report on Governance for South Africa 2009 <[www.iodsa.co.za/?kingIII](http://www.iodsa.co.za/?kingIII)> accessed 15 July 2014
- Polish Code(s) of Best Practices <[www.corp-gov.gpw.pl/?jezyk=angielski](http://www.corp-gov.gpw.pl/?jezyk=angielski)> accessed 14 May 2014
- Singapore Code(s) of Corporate Governance <[www.mas.gov.sg/regulations-and-financial-stability/regulatory-and-supervisory-framework/corporate-governance/corporate-governance-of-listed-companies/code-of-corporate-governance.aspx](http://www.mas.gov.sg/regulations-and-financial-stability/regulatory-and-supervisory-framework/corporate-governance/corporate-governance-of-listed-companies/code-of-corporate-governance.aspx)> accessed 24 June 2014
- UK Corporate Governance Code(s) <[www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx](http://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx)> accessed 28 May 2014

# LIST OF CASES

## European Union

Centros Ltd. v Erhvervs- og Selskabsstyrelsen (C-212/97) [1999] ECR I-1459

Commission v Belgium (C-503/99) [2002] ECR I-4809

Commission v Portugal (C-367/99) [2002] ECR I-4731

Commission v United Kingdom (C-98/01) [2003] ECR I-4641

Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd. (C-167/01) [2003] ECR I-10155

Überseering B.V. v Nordic Construction Company Baumanagement GmbH (NCC) (C-208/00) [2002] ECR I-9919

## Poland

Judgment of the Court of Appeal in Łódź of 7 March 1994, I ACr 21/94

Judgment of Supreme Court of 17 August 1998, III CRN 77/93

Judgment of the Court of Appeal in Katowice of 5 November 1998, I Aca 322/98

Judgment of Supreme Court of 26 January 2000, I PKN 482/99

Judgment of the Supreme Court of 9 May 2000, IV CKN 117/00

Judgment of the Supreme Court of 23 October 2003, V CK 411/02, OSNC 2004/12 item 197

Judgment of the Supreme Court of 30 September 2004, IV CK 713/03

## US

Aronson v Lewis, 473A.2d, 805 (at 812) (Del. 1984)

Unocal v Mesa Petroleum Co., 493 A.2d 946 (Del. 1985)

Varity Corp. v Howe et al. (94-1471), 516 U.S. 489 (1996)

# LIST OF APPENDICES

<b>Appendix 1</b>	209
<b>Table 1.</b> Shareholders and creditor rights	
<b>Appendix 2</b>	210
Examples of company explanations on compliance with the UK Corporate Governance Code	
<b>Appendix 3</b>	212
<b>Table 2.</b> Main forms of doing business in Poland	
<b>Appendix 4</b>	216
<b>Table 3.</b> Summary of main categories of share ownership in the UK 1963-2010	
<b>Appendix 5</b>	217
<b>Table 4.</b> Shareholder structure of five largest Polish companies	
<b>Table 5.</b> Shareholder structure of banks in Poland	
<b>Appendix 6</b>	218
<b>Chart 1.</b> Average remuneration for members of management boards in 2012	
<b>Appendix 7</b>	219
<b>Table 6.</b> Presence of committees on supervisory boards in Poland	
<b>Appendix 8</b>	219
<b>Chart 2.</b> Size of supervisory boards in Poland	
<b>Appendix 9</b>	220
Example of higher financial performance of companies with a larger number of women on their boards	

<b>Appendix 10</b>	221
<b>Table 7.</b> Median annual remuneration for presidents and members of supervisory boards according to the size of companies (index WIG)	
<b>Appendix 11</b>	221
Participation Information Sheet (in English)	
Participation Information Sheet (in Polish)	
<b>Appendix 12</b>	227
Consent for Participation (in English)	
Consent for Participation (in Polish)	

## **ABBREVIATIONS OF TERMS**

ACRA – Accounting and Corporate Regulatory Authority

Act on Public Offering (...) and Public Companies – Act of 29 July 2005 on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and on Public Companies  
Act on Statutory Auditors – Act of 29 May 2009 on Statutory Auditors, Their Self-Governing Organisation, Entities Authorised to Audit Financial Statements and on Public Oversight

ASC – Accounting Standards Council

Code of Best Practices – Code of Best Practices of 2010

Best Practices – Code of Best Practices of 2010

CCC – Act of 15 September 2000 on the Commercial Partnerships and Companies

CCDG – Council on Corporate Disclosure and Governance

CEO – chief executive officer

CEP – Continuing Education Programme

CFO – chief finance officer

CFP – corporate financial performance

Company Code of 2000 – Act of 15 September 2000 on the Commercial Partnerships and Companies

CPTPE – Commission on Public Trust and Private Enterprise

CSP – corporate social performance

ECJ – European Court of Justice

FEI – Financial Executives International

FSA – Polish Financial Supervision Authority

FRC – Financial Reporting Council

FRSP – Financial Reporting Surveillance Programme

FTSE350 – the largest 350 companies by capitalisation, which have their primary listing on the London Stock Exchange

ILO – International Labour Organisation

JSC – joint-stock company

LLC – limited Liability Company

MAP – Mandatory Accreditation Program

MAS – Monetary Authority of Singapore

MBCA – Model Business Corporate Act

NIF – National Investment Fund

OECD – Organisation for Economic Co-operation and Development



Privatisation Act – Act of 30 August 1996 on Commercialisation and Privatisation of State-owned Enterprises

PwC – PricewaterhouseCoopers

Regulation on the current and periodic disclosures (...) – Regulation of the Minister of Finance of 19 February 2009 on the current and periodic disclosures to be made by issuers of securities and conditions for recognition as equivalent of information where disclosure is required under the laws of a non-member state

SE – European Company

SEC – Securities and Exchange Commission

SFA – Securities and Futures Act

SGX – Singapore Stock Exchange

SOE – state-owned enterprise

TARP – Troubled Asset Relief Program

TSE – Tokyo Stock Exchange

UN – United Nations

WIG20 – twenty largest companies in Poland

mWIG40 – forty largest companies in Poland

sWIG80 – eighty largest companies in Poland

WSE – Warsaw Stock Exchange

## **COPYRIGHT DECLARATION**

### **HYBRID CORPORATE GOVERNANCE: A CHOICE FOR POLAND?**

**KATARZYNA ANNA SAMÓŁ**

Attention is drawn to the fact that copyright of this thesis rests with

- (i) Anglia Ruskin University for one year and thereafter with
- (ii) Katarzyna Anna Samół

This copy of the thesis has been supplied on condition that anyone who consults it is bound by copyright.

This work may:

- (i) be made available for consultation with Anglia Ruskin University, or
- (ii) be lent to other libraries for the purpose of consultation or may be photocopied for such purposes
- (iii) be made available in Anglia Ruskin University's repository and made available on open access worldwide for non-commercial educational purposes, for an indefinite period.

# I. INTRODUCTORY REMARKS

The internal structure of the Polish joint-stock company (the equivalent of an English public limited company (plc.) or a German *Aktiengesellschaft* (AG))<sup>1</sup> is traditionally based on the two-tier ('dual') board system of German origin with two obligatory boards – a management board and a supervisory board (optional in a smaller limited liability company (the equivalent of an English private company (Ltd.) or a German *Gesellschaft mit beschränkter Haftung* (GmbH))<sup>2</sup>). The supervisory board supervises the management board and oversees the company's financial statements, it also reports to the shareholders on the activities of the company. The management board carries out the day-to-day business of the company and is accountable for issues that are not the responsibility of the supervisors or the shareholders' meeting. The company's articles of association/statutes<sup>3</sup> often expands on the areas to be covered by the management board.

Such a picture of corporate governance in Poland is usually presented in business reports addressed to investors and sponsored by the government. But when we place it under a magnifying glass, the system turns out to be far less coherent.

Generally speaking, a problem of Polish corporate governance lies in that a supervisory board is only theoretically a supervisory body and not a management body<sup>4</sup>. In practice, members of the management board are strongly reliant on the majority shareholder, spreading the power via the supervisory board. Members of the management board in a joint-stock company (JSC) are typically appointed and removed by the supervisory board<sup>5</sup>, which might be composed of the shareholders exclusively. The statutes may provide for a broader scope of powers of the supervisory board<sup>6</sup>.

Speaking more precisely, the main feature of the Polish corporate governance system is the prevalence of consolidated ownership that significantly weakens the system of protection of the minority shareholder. Voting control in listed companies in Poland shows a median concentration rate of 39.5%<sup>7</sup> (the concentration might be a lot higher in non-listed companies; see chapters V and

---

<sup>1</sup> Marat Terterov and Johnathan Reuvid (eds), *Doing Business with Poland* (4th edn, GMB Publishing Ltd 2005) 53.

<sup>2</sup> *ibid.*

<sup>3</sup> Articles of association, together with the memorandum of association, are the constitution of a limited liability company. Statutes perform the same function in a joint-stock company.

<sup>4</sup> Piotr Kozarzewski and Richard Woodward, 'Secondary Privatization in Poland (Part I): Evolution of Ownership Structure and Company Performance in Firms Privatized by Employee Buyout' (Center for Social and Economic Research, Case Reports No. 47, Warsaw 2001) <[www.case-research.eu/upload/publikacja\\_plik/RC47.pdf](http://www.case-research.eu/upload/publikacja_plik/RC47.pdf)> accessed 29 March 2014.

<sup>5</sup> Art. 368§2 and 4CCC.

<sup>6</sup> Art. 383 and 384 CCPC (for a JSC) and Art. 220CCPC (for an LLC).

<sup>7</sup> Krzysztof Oplustil and Arkadiusz Radwan, 'Company Law in Poland: Between Autonomous Development and Legal Transplants' in Christa Jessel-Holst, Rainer Kulms and Alexander Trunk (eds), *Private Law in Eastern Europe: Autonomous Development or Legal Transplants?* (Mohr Siebeck 2011) 453.

VI, where the issue is explained in detail). It results in such problems as conflicts between majority shareholders and minority shareholders, private benefits of control at the expense of the minority (eg tunnelling of assets and profits to majority shareholders, payment of hidden dividends), and the inequality in treatment of minority shareholders by company authorities<sup>8</sup>. There are also cases of abuse of shareholders rights by individual investors, in particular challenging important resolutions of the shareholders' meeting in order to intimidate the company or its majority shareholders<sup>9</sup>.

The main law on corporate governance in Poland is encompassed in the Act of 15 September 2000, the Commercial Partnerships and Companies Code (the Company Code of 2000). Both the Company Code of 2000 and its predecessor, the Commercial Code of 1934, were principally founded on the German and Austrian legal tradition<sup>10</sup>. While Polish law has long been under the influence of both German and French law for historical and cultural reasons (with certain influences from Anglo-American law), the Company Code of 2000 is fundamentally entrenched in the tradition of German company law (the German Commercial Code of 1897)<sup>11</sup>. The choice of the German model for reforming Polish company law is mostly due to the fact that the 1934 codification earned itself a brilliant reputation and survived until the new Millennium, even though in the era of centrally-planned economy in Poland (1945-1989) it had no practical meaning<sup>12</sup>.

Nonetheless, the Company Code of 2000 as well as other legal acts regulating corporate governance structures in Poland are not particularly adequate or instructive, often giving general ideas and principles rather than concrete solutions. This goes together with the weakened system of rights and safeguards regulating corporate governance relations within companies. As a result, minority interests can be (and sometimes are) abused with the help of anti-collusion provisions, eg the right of supervision shall be conferred upon each shareholder in a limited liability company (LLC), but the articles of association may exclude or restrict individual control by shareholders

---

<sup>8</sup> Maciej Dzierżanowski and Piotr Tamowicz, 'Ownership and Control of Polish Listed Corporations' (Gdańsk Institute for Market Economics, May 2003) <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=386822](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=386822)> accessed 9 September 2011.

<sup>9</sup> Oplustil & Radwan (n 7) 455.

<sup>10</sup> Stanisław Sołtysiński, 'Reform of Polish Company Law' in Bernhard Grossfeld (ed), *Festschrift für Wolfgang Fikentscher zum 70. Geburtstag* (Mohr Siebeck 1998) 419, where he expresses the opinion that the majority of the Commercial Code rules can be characterised as a 'slavish' imitation of their German models.

<sup>11</sup> For a description of the main features of the Company Code, as well as of the sources of foreign inspiration in its drafting, see Stanisław Sołtysiński, 'Sources of Foreign Inspiration in the Draft of the Polish Company Law' in Theodor Baums, Klaus J. Hopt and Norbert Horn (eds), *Corporations, Capital Markets and Business in the Law* (Kluwer Law International 2000) 533; Rafał T. Stroiński, 'Takeovers in Poland – Current Regulations and Towards Implementation of the Takeover Directive' (2005) 16 (6) *European Business Law Review* 1443; see also Stanisław Sołtysiński, 'Transfer of Legal Systems as Seen by the "Import Countries": A View from Warsaw' in Ulrich Drobnig, Klaus J. Hopt, Hein Kötz and Ernst-Joachim Mestmäcker (eds), *Systemtransformation in Mittel- und Osteuropa und ihre Folgen für Banken, Börsen und Kreditsicherheiten* (Mohr Siebeck 1998) 70-72.

<sup>12</sup> Oplustil & Radwan (n 7); Dennis A. Rondinelli and Jay Yurkiewicz, 'Privatisation and Economic Restructuring in Poland: An Assessment of Transitional Policies' (1996) 55 (2) *The American Journal of Economics and Sociology* <[www.jstor.org/stable/3487075](http://www.jstor.org/stable/3487075)> accessed 12 July 2011.

where the supervisory board or auditors' committee has been established<sup>13, 14</sup>

Some changes to corporate law in Poland have been made by the EU legislation after the date of accession of Poland to the EU, eg the implementation of the Shareholder Rights Directive (2007/36/EC) resulted in significant amendments to the Company Code of 2000. It should be added that the overwhelming majority of the EU company law directives have been implemented in the Company Code (including the Third, Sixth and Tenth Company Law Directive).<sup>15</sup> However, it did not change considerably the politics of controlling shareholders towards minority shareholders in Poland.

A kind of recovery mechanism for relations between majority and minority shareholders was the Code of Best Practices, adopted first time in 2002 by the supervisory board of the Warsaw Stock Exchange (WSE)<sup>16</sup>. The latest version of the Code was then issued by the WSE in 2010 (it has been amended several times since then)<sup>17</sup>. According to its preamble, the Code is to strengthen the protection of shareholders' rights (including those not regulated by legislation), enhance the transparency of listed companies, and improve the quality of communication between companies and investors<sup>18</sup>.

The Code adopts or refers to many principles, recommendations and codes of good practice issued in other countries or by international organisations, such as the OECD Principles of Corporate Governance, British corporate governance codes – mainly Cadbury and Hampel, the EASD Corporate Governance Principles, as well as the recommendations and guidelines issued by Euroshareholders<sup>19</sup>. The Code *inter alia* addresses the issue of independence of supervisory board members, or the necessity of preparation by the supervisory board and presentation to the ordinary shareholders' meeting a brief annual assessment of the company's standing (including evaluation of the internal control system and of the risk management system) as well as a self-evaluation report<sup>20</sup>. It does not, however, resolve problems of corporate governance, mainly because the Code is not legally binding. The Code of Best Practices can be regarded as a soft law-instrument aimed at improving corporate governance in companies listed on the WSE<sup>21</sup>.

---

<sup>13</sup> Art. 212§1 and 213§3CCC.

<sup>14</sup> See Piotr Kozarzewski, 'Privatization and Corporate Governance in Poland: Problems and Trends' (Centre for Social and Economic Research, Studies & Analyses No. 325, Warsaw 2006) <[www.case-research.eu/en/node/55442](http://www.case-research.eu/en/node/55442)> accessed 17 May 2014.

<sup>15</sup> Other company law directives did not revolutionise Polish law either. This is explained by the fact that early directives bore a strong German influence, which in turn was to a significant extent 'directly' (without European intermediation) reflected in the Polish pre-war legislation. See Oplustil & Radwan (n 7) 464.

<sup>16</sup> *ibid* 488.

<sup>17</sup> In May 2010, the Code was reviewed and amended in order to adjust its 'soft' regulation to the latest amendments of the Company Code of 2000, as well as to the current trends in corporate governance.

<sup>18</sup> An English version of the Code is available on <[www.corp-gov.pgw.pl](http://www.corp-gov.pgw.pl)> accessed 2 March 2014.

<sup>19</sup> Dzierżanowski & Tamowicz (n 8).

<sup>20</sup> Text to n 18. The issues will be developed in subsequent chapters.

<sup>21</sup> Oplustil & Radwan (n 7) 492.

The main undertaking of the research therefore was to search for practical solutions that would equalise the right of all shareholders in Poland within foreign legal systems. I focused, however, primarily on the achievements of Anglo-Saxon corporate governance, because its common law orders are considered to have good protection of shareholders' rights<sup>22</sup>.

According to La Porta *et al.*<sup>23</sup>, efficient protection of shareholders rights has a key influence on the type of ownership and control structure in a given legal order: 'Often, if the legal environment does not have good protection of shareholders' rights, then this discourages a diverse shareholder base whilst being more conducive to family-owned firms where a relatively small group of individuals can retain ownership, power, and control' (see Appendix 1). A survey conducted by La Porta *et al.*<sup>24</sup> proved that companies in traditionally civil law legal systems, such as in France, Germany and Russia have a weaker dispersed share ownership structure. Meanwhile, in Anglo-Saxon countries (especially in the US and the UK) great corporations are owned by millions of middle class shareholders, each owning a few hundred or a few thousand shares. Only a handful of institutional investors accumulate large stakes – 3 or even 5% of an occasional large firm's stock<sup>25</sup>.

The Anglo-Saxon corporate governance approach has however also been experiencing troubles since the early 1990s. The greatest high-profile corporate collapses, eg Enron, WorldCom, Barings Bank, took place either in the US or in the UK<sup>26</sup>. As Mallin<sup>27</sup> describes:

'These corporate collapses have had an adverse effect on many people: shareholders who have seen their financial investment reduced to nothing; employees who have lost their jobs and, in many cases, the security of their company pension, which has also evaporated overnight; suppliers of goods or services to the failed companies; and the economic impact on the local and international communities in which the failed companies operated.'

The main threat for the good prosperity of companies in the UK is probably the non-binding character of the UK Corporate Governance Code (the UK Code of 2012)<sup>28</sup>. Enforcement of key legal provisions, eg those concerning the appointment of non-executive directors, the establishment of

---

<sup>22</sup> Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny, 'Investor Protection and Corporate Governance' (2000) 58 *Journal of Financial Economics* 3.

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

<sup>25</sup> Randall K. Morck and Lloyd Steier, 'The Global History of Corporate Governance: Introduction' (The National Bureau of Economic Research, November 2005) <[www.nber.org/papers/w11062](http://www.nber.org/papers/w11062)> accessed 5 June 2012.

<sup>26</sup> See, for example, Nancy B. Rapoport, Jeffry D. Van Niel and Bala G. Dharan, *Enron and Other Corporate Fiascos: The Corporate Scandal Reader* (2nd edn, Foundation Press 2009).

<sup>27</sup> Christine A. Mallin, *Corporate Governance* (4th edn, Oxford University Press 2013) 1.

<sup>28</sup> The full text of the Code is available on <[www.frc.org.uk](http://www.frc.org.uk)> accessed 19 May 2014.

an audit committee or a satisfactory dialogue with shareholders, relies on the ‘comply or explain’ principle<sup>29</sup>. Listed companies have to state in their annual reports whether they comply with the Code provisions, identify any areas of non-compliance, and explain clearly and carefully to shareholders the reasons in light of their own particular circumstances<sup>30</sup>. Yet, the ‘comply or explain’ mechanism has been rather effective over the last decade. Research<sup>31</sup> published in 2010 illustrates that, overall, nearly 84.7% of companies declare compliance with the Code.

On the other hand, the US legislative body set an example that sanctioning for non-compliance with a code (‘comply or else’) can also be uncertain for business. Codification of a part of corporate governance in the US by Congress, known as the Sarbanes-Oxley Act of 2002 (SOX), significantly increased the cost of running a business. Due to an exacerbation of the internal control system in companies<sup>32</sup> during 2004, US companies with revenues exceeding \$5 billion spent 0.06% of revenue on SOX compliance, while companies with less than \$100 million in revenue spent 2.55%<sup>33</sup>. It is said that ‘[t]he total cost to the American economy of complying with SOX is considered to amount to more than the total write-off of Enron, World Com and Tyco combined [the biggest corporate collapses in the US]’<sup>34</sup>. Romano<sup>35</sup> declares: ‘SOX’s corporate governance provisions were ill-conceived. Other nations, such as the members of the European Union who have been revising their corporation codes, would be well advised to avoid Congress’ policy blunder.’

This advice however requires a deeper consideration. For example, a Finance Executives International Survey<sup>36</sup> (annual) on SOX Section 404 costs finds that they have continued to decline relative to revenues since 2004. The 2007 study shows that, for 168 companies with average revenues of \$4.7 billion, the average compliance costs were \$1.7 million (0.036% of revenue). The 2006 study indicates that, for 200 companies with average revenues of \$6.8 billion, the average

<sup>29</sup> *ibid.* The issues will be expanded in further chapters.

<sup>30</sup> *ibid.*

<sup>31</sup> Sridhar Arcot, Valentina Bruno and Antoine Faure-Grimaud, ‘Corporate Governance in the UK: Is the Comply or Explain Approach Working?’ (2010) 30 *International Review of Law Economics* 193.

<sup>32</sup> Section 404 requires management and the external auditor to report on the adequacy of the company’s internal control on financial reporting, and this is the most costly aspect of the legislation for companies to implement, as it requires enormous effort. See, for example, Morgen Witzel, *Builders & Dreamers. The Making and Meaning of Management* (Pearson Education Limited 2002) 39.

<sup>33</sup> Securities and Exchange Commission, ‘Final Report of the Advisory Committee on Smaller Public Companies to the United States Securities and Exchange Commission’ (Washington, 23 April 2006) <[www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf](http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf)> accessed 17 May 2012.

<sup>34</sup> Mervyn E. King, ‘Introduction and Background’ in Institute of Directors in Southern Africa, ‘King Report on Governance for South Africa 2009’ <[www.iodsa.co.za/](http://www.iodsa.co.za/)> accessed 14 March 2013.

<sup>35</sup> *ibid.*

<sup>36</sup> Finance Executives International, ‘Fei Survey: Management Drives Sarbanes-Oxley Compliance Costs Down by 23%, But Auditors Fees Virtually Unchanged’ (May 2007) <[www.web.archive.org/web/20071011142102/http://fei.mediaroom.com/index.php?s=press\\_releases&item=187](http://www.web.archive.org/web/20071011142102/http://fei.mediaroom.com/index.php?s=press_releases&item=187)> accessed 28 November 2013.

compliance costs were \$2.9 million (0.043% of revenue), down 23% from 2005.<sup>37</sup>

There is also another reason for which the Anglo-Saxon legal orders might set a benchmark for other legal orders in the area of corporate governance. Except for good protection of shareholders rights, both the American and British regimes draw attention to a higher degree of protection of stakeholders. This has a very positive impact on the financial performance of companies, eg Verschoor and Murphy<sup>38</sup> found empirical evidence that companies devoted to social and environmental issues that are significant to their stakeholders also have 'superior' financial performance. The approach is called the 'enlightened stakeholder value', and is a halfway standpoint of the stakeholder value and the shareholder value.

The shareholder value – to which the US and the UK used to adhere – assumes that the main responsibility of a company is to maximise shareholder interests, while the stakeholder model argues that governing bodies also have a responsibility to parties other than shareholders (employees, suppliers, customers, local communities, etc). What is more, there is an opinion that 'any fiduciary obligations owed to shareholders to maximize profits might be subject to the constraint of respecting obligations owed to such stakeholders'<sup>39</sup>. Many continental European countries have legislated the stakeholder theory into action. They require such measures as employee representation on corporate boards and consultation with labour about mergers and acquisitions, in addition to detailed reporting on a variety of social and environmental issues<sup>40</sup>.

In the US, more than 100,000 federal, state, and local rules and regulations on environmental protection have been issued<sup>41</sup>. Compared to 20 years ago, corporations are much more likely to employ such stakeholders as suppliers, customers, employees, and members of the public on their boards of directors<sup>42</sup>. There is considerable evidence that court decisions also favour a responsibility to non-shareholder stakeholders (see for example decision in *Unocal v. Mesa*

---

<sup>37</sup> *ibid.*

<sup>38</sup> Curtis C. Verschoor and Elizabeth A. Murphy, 'The Financial Performance of Large U.S. Firms and Those with Global Prominence: How Do the Best Corporate Citizens Rate?' (2002) 107 (3) *Business and Society Review* 371.

<sup>39</sup> Darryl Reed, 'Corporate Governance in Developing Countries' (2002) 37 *Journal of Business Ethics* 223.

<sup>40</sup> Moreover, the EU also aims to promote stakeholder law within its territory. See, for example, Council Directive 2001/86/EC of 8.10.2001 supplementing the Statute for a European company with regard to the involvement of employees <[www.ec.europa.eu/internal\\_market/company/modern/index\\_en.htm](http://www.ec.europa.eu/internal_market/company/modern/index_en.htm)> accessed 7 June 2012. See also Thomas Donaldson and Lee E. Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications' (1995) 20 *Academy of Management Review* 65; John Martin Conley, 'CPR Perspective: Changing Corporate Behavior in a Socially Responsible Direction' (Centre for Progressive Reform, 2008) <[www.progressivereform.org/perspCorp\\_behav.cfm](http://www.progressivereform.org/perspCorp_behav.cfm)> accessed 15 June 2012.

<sup>41</sup> Michael A. Berry and Dennis A. Rondinelli, 'Proactive Corporate Environment Management: A New Industrial Revolution' (1998) 12 (2) *Academy of Management Executive* 38.

<sup>42</sup> Patrick Luoma and Jerry Goodstein, 'Stakeholders and Corporate Boards: Institutional Influences on Board Composition and Structure' (1999) 42 (5) *Academy of Management Journal* 553.



*Petroleum Co.* on corporate defensive tactics against take-over bids<sup>43</sup>). In the UK, the Companies Act of 2006 mandates that company directors shall include, *inter alia*, the interests of the company's employees, the need to foster the company's business relationships with suppliers, customers and others, and the impact of the company's operations on the community and the environment in their decision making<sup>44</sup>.

A similar tendency can be observed in legal orders originating from the Anglo-Saxon law tradition. The South African legislative body has developed the 'enlightened stakeholder' value. The so-called 'stakeholder inclusive' was included in the African Code of Governance Principles 2009, King III.

Despite the fact that the 'stakeholder inclusive' as well as the 'enlightened shareholder' approach to corporate governance assume that the board of directors should also consider the legitimate interests and expectations of stakeholders other than shareholders, the way in which they are treated by the board in the two approaches is very different. As King<sup>45</sup> declares:

'In the 'enlightened shareholder' approach the legitimate interests and expectations of stakeholders only have an instrumental value. Stakeholders are only considered in as far as it would be in the interests of shareholders to do so. In the case of 'stakeholder inclusive' approach, the board of directors considers the legitimate interests and expectations of stakeholders on the basis that this is in the best interests of the company, and not merely as an instrument to serve the interests of the shareholder. (...) The integration and trade-offs between various stakeholders are then made on a case-by-case basis, to serve the best interests of the company.'

*Inter alia*, this change in South African corporate governance was called by Andreasson<sup>46</sup> a 'hybridisation' of corporate governance. For Andreasson<sup>47</sup> this means linking solutions of both the shareholder and the stakeholder approach to corporate governance, taking however into consideration all social, legal and economic changes that have taken place within the community. It should be noted that this clearly complies with the prevailing opinion about legal transplantation:

---

<sup>43</sup> The Delaware Supreme Court weakened the so-called 'business judgment rule', which vests management with exclusive authority over the conduct of a company's affairs only on the condition that the financial welfare of shareholders is single-mindedly pursued. According to the ruling, a board of directors may only try to prevent a take-over where it can be shown that there was a threat to corporate policy and the defensive measure adopted was proportional and reasonable given the nature of the threat.

<sup>44</sup> Part 15, Chapter 5, section 417 of the Companies Act of 2006.

<sup>45</sup> King (n 34).

<sup>46</sup> Stefan Andreasson, 'Understanding Corporate Governance Reform in South Africa: Anglo-American Divergence, the King Reports and Hybridization' (December 2011) <[www.works.bepress.com/cgi/viewcontent.cgi?article=1007&context=stefan\\_andreasson](http://www.works.bepress.com/cgi/viewcontent.cgi?article=1007&context=stefan_andreasson)> accessed 2 February 2013.

<sup>47</sup> *ibid.*

that one needs to provide a broader context to understand the nature of the reception within the legal system and its practices<sup>48</sup>. The contrasting standpoint is that the process of borrowing is, at least occasionally, insulated from social and economic change in the recipient legal culture<sup>49</sup>.

Interestingly, other former British colonies have also made the same step forward in terms of companies' management. They have introduced several changes to their corporate governance, which created a kind of compromise between the shareholder approach and the stakeholder approach to corporate governance. This can be exemplified by reforms in Malaysia and Singapore.

Surveys<sup>50</sup> reveal that some 86% of Malaysian companies have a clear division between the CEO and chairman roles, and 96% of companies have one-third independent board members and almost half have appointed a senior independent director to whom minority shareholders can directly report to. Malaysia appeared to be making a great deal of progress promoting the development of sound corporate governance systems and practices, and 'had in fact stolen a lead over the US in its drive for higher standards of corporate governance.'<sup>51</sup>

However, arguably the most innovatory reform in Malaysia was the Mandatory Accreditation Program, which required all directors of publicly listed companies to go for mandatory training<sup>52</sup>. For some Malaysian critics it turned out to be the most rewarding for companies in Malaysia<sup>53</sup>. It enhanced directors' professionalism through constant reskilling<sup>54</sup>.

Malaysia was apparently the only country in the world where directors were trained obligatorily<sup>55</sup>. The tendency to sanction activities is common for countries adhered to the civil law tradition<sup>56</sup>.

Malaysia was ranked number one in Asia for having the most effective rules and regulations for corporate governance, on the basis of a survey conducted by independent brokerage and research house CLSA Ltd. The survey<sup>57</sup>, conducted in 2005, took into consideration three factors: adaptation to international generally accepted accounting principles, political and regulatory

---

<sup>48</sup> See, for example, William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplant' (1995) 43 American Journal of Comparative Law 489.

<sup>49</sup> The main advocate of the viewpoint is Watson; see, for example, Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974).

<sup>50</sup> Philip Koh Tong Ngee, 'Corporate Governance in Malaysia: Regulatory Reform and Its Outcomes' in Asian Productivity Organization, 'Best Practices in Asian Corporate Governance' (Tokyo 2007) <[http://www.apo-tokyo.org/publications/files/ind-20-bp\\_acg.pdf](http://www.apo-tokyo.org/publications/files/ind-20-bp_acg.pdf)> accessed 16 June 2012.

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.*

<sup>56</sup> John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007).

<sup>57</sup> Philip Koh Tong Ngee (n 50).

environment, and international mechanism and corporate governance culture.

Similarly, Singapore 'made considerable progress in introducing best practice and a corporate governance framework with systems in place to encourage good governance'<sup>58</sup>. In 2010, corporate governance rankings in 11 markets in Asia conducted by the Asian Corporate Governance Association and Credit Lyonnais Securities Asia-Pacific Markets, Singapore is ranked first – up from second from the prior rankings in 2007<sup>59</sup>.

These are fairly high standards of corporate disclosure compared to its neighbours in the Asian region, as well as the US and European countries, which contributed to the success<sup>60</sup>.

The disclosure system is a middle ground for the system that exists in Canada and the United Kingdom, and it aims to avoid two extremes: a prescriptive approach under which companies must comply and a non-prescriptive self-regulatory approach where every company is free to adopt its own practices. Accordingly, in Singapore companies are encouraged to ascertain their level of disclosure independently.<sup>61</sup>

The Anglo-American corporate practice also influenced corporate governance in Japan. The beginning of the 21st century saw some radical changes in Japanese corporate law, which made Japanese corporate authorities more protective of the shareholder establishment.<sup>62</sup> Previously, Japanese corporate governance was modelled on the European corporate law<sup>63</sup>.

Since April 2003, Japanese companies have, for example, had a choice between two approaches to corporate governance: the two-tier board system and the one-tier ('unitary') board system. The so-called committee system is similar to the system adopted by listed US companies<sup>64</sup>. In this system, the board of directors is accountable for monitoring the management and an executing role is given to executive officers. Besides, the board of directors is required to have the following three committees: an auditing committee, an appointment committee and a remuneration committee, consisting of at least three directors of which a majority have to be outsiders<sup>65</sup>.

Despite the choice given to Japanese entrepreneurs, an overwhelming majority (some 98%)

---

<sup>58</sup> *ibid.*

<sup>59</sup> KPMG Audit Committee Institute, 'Singapore's Corporate Governance, Transformed: The Strategy to Get It Right' (Singapore, 2011) <[www.kpmg.com/SG/en/IssuesAndInsights/CFOPublications/Documents/SingaporeCorporateGovernanceTransformed.pdf](http://www.kpmg.com/SG/en/IssuesAndInsights/CFOPublications/Documents/SingaporeCorporateGovernanceTransformed.pdf)> accessed 25 June 2014.

<sup>60</sup> Tan Wee Liang, 'The Evolution of the Disclosure Regime in Singapore' in Asian Productivity Organization, 'Best Practices (...)' (n 50).

<sup>61</sup> *ibid.*

<sup>62</sup> See, for example, Toru Yoshikawa, 'Corporate Governance in Japan: Flexible Adoption of Shareholder – Oriented Practices' in Asian Productivity Organization, 'Best Practices (...)' (n 50).

<sup>63</sup> See, for example, Mark Levin, 'Continuities of Legal Consciousness: Professor John Haley's Writings On Twelve Hundred Years of Japanese Legal History' (2009) 8 Washington University Global Studies Law Review 317 <[www.ssrn.com/abstract=1551420](http://www.ssrn.com/abstract=1551420)> accessed 23 May 2014.

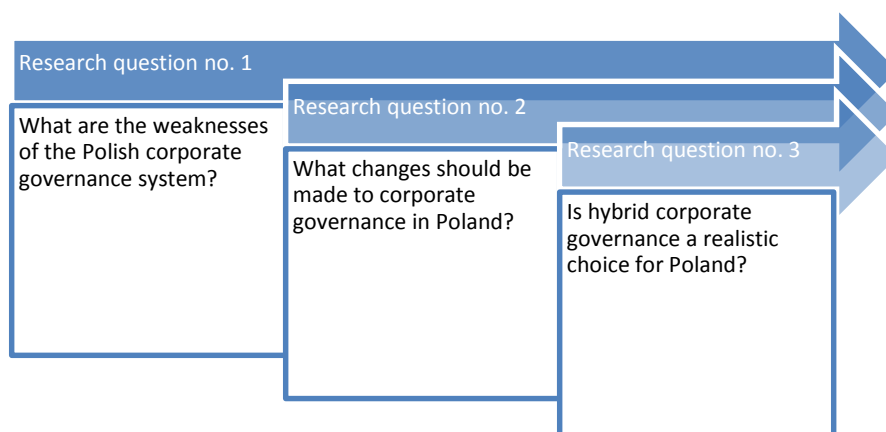
<sup>64</sup> Yoshikawa (n 62).

<sup>65</sup> *ibid.*

of Japanese companies have elected to retain the auditors structure<sup>66</sup>. Meanwhile, ‘the future of Japanese corporate governance may lie in the development of hybrid systems that are intended to combine the best elements of the board management and monitoring models’<sup>67</sup>. Japanese companies have actually been criticised for not appointing independent directors<sup>68</sup>. There has been a long discussion about the issue over the last fifteen years<sup>69</sup>.

The reluctance of Japan to adopt the committee system of corporate governance encouraged me to do research which will have, as a main object, Polish corporate governance. I thought that it would be worth considering whether an ‘alternative’ corporate governance system could be implemented in Poland. The idea was dictated purely by my curiosity. The concept of the effectiveness of a one-tier board system in a traditionally two-tier board system, and *vice versa*, has not been explored yet.

Gradually, I broadened out my research proposal into other corporate governance issues that were subject to reforms in the Anglo-American law-based countries. So such issues as, for example, the Singapore disclosure system, those two combinations of the stakeholder value and the shareholder value, the ‘enlightened shareholder’ value and the ‘stakeholder inclusive’ value; the independence of board members, or some other boardroom reforms, eg concerning board committees, were also included with my research. I formulated the following research questions based on all those issues:



**Figure 1.** Questions for research on corporate governance in Poland

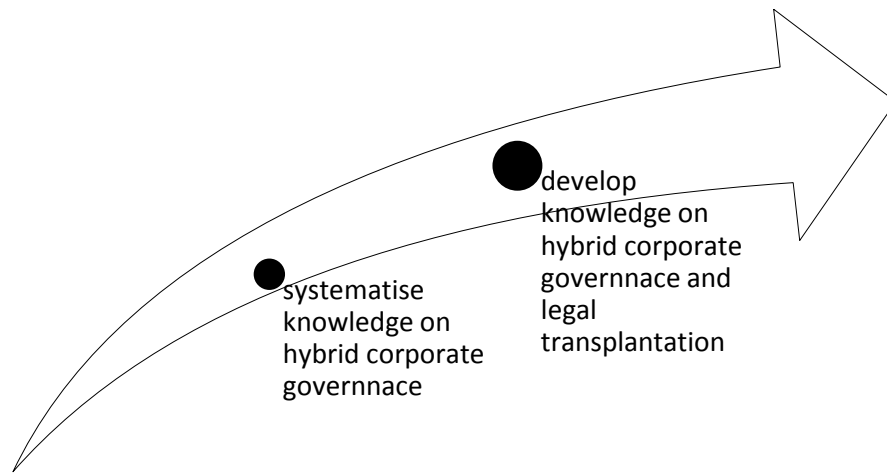
<sup>66</sup> Bruce E. Aronson, ‘Fundamental Issues and Recent Trends in Japanese Corporate Governance Reform: A Comparative Perspective’ (2014) *Hastings Business Law Journal* (forthcoming) <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2448076](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2448076)> accessed 25 June 2014.

<sup>67</sup> *ibid.*

<sup>68</sup> Kosaku Narioka, ‘Corporate-Governance Code Is Urged in Japan. Ruling-Party Proposal Would Be Aimed at Luring Foreign Investors’ (*The Wall Street Journal*, 27 May 2014) <[www.online.wsj.com/news/articles/SB10001424052702304811904579587853072014222](http://www.online.wsj.com/news/articles/SB10001424052702304811904579587853072014222)> accessed 14 May 2014.

<sup>69</sup> Aronson (n 66).

One of my first objectives was to, through my research, contribute to knowledge on legal transplantation, which has been mainly captured by legal theorists. My aim was to approach the concept on a more practical level, providing real examples of legal transplant from the Polish corporate system. I also addressed the issue of possible transplantation of those hybrid corporate governance innovations.



**Figure 2.** Objectives of this research project

Another objective was to systematise knowledge on hybrid corporate governance, scattered over several publications. What is more, Polish legal doctrine is practically silent about the issue.

In order to fill the gap in knowledge on potential hybridisation of Polish corporate governance, I decided to conduct interviews with business practitioners in Poland. I deliberately chose this group of people, as their point of view concerning corporate governance is usually free of theoretical influences, and therefore fresher and more practical.

Actually, my research is a combination of both practical knowledge and theory on corporate governance. Information coming from these two sources was compared against each other. This comparative research embraced several legal orders, which made it very interesting to me.

This research might also contribute to knowledge in that, legal solutions in the area of commercial law have commonly been shared by countries worldwide (see section 'Legal Transplant in Polish Corporate Law' in chapter VI). Accordingly, information gathered during interviews in Poland might turn out to be useful for researchers in other legal orders.

In chapter III, I analyse the 'critical points of current knowledge'<sup>70</sup> on hybrid corporate governance in the world. This includes an analysis of some aspects of corporate governance in South Africa, Japan, Malaysia and Singapore. In this chapter, I also define hybrid corporate

<sup>70</sup> Amy B. Dellinger, 'Validity and the Review of Literature' (2005) 12 (2) Research in the Schools 41.

governance and refer to the issue of legal transplantation, with which the research topic is strongly associated.

Chapter IV deals with corporate governance in the US and the UK. Solutions of both were incorporated into hybrid regimes in South Africa and Asia. Besides, the latest changes to corporate governance in both countries also have a hybrid character.

Chapter V examines the structure and functioning of corporate governance in Poland. The aim was to catch the essence of the mechanism, and present its main problems. Issues raised in this chapter are then developed in chapter VI, which I dedicated entirely to an analysis of the interviews.

My final conclusions are incorporated in chapter VII, where I also describe the limitations of this research.

In general, my research concerns only limited companies. I develop the issue of delimitations of this research in chapter VII.

The subsequent chapter deals with methodology applied to this research. It also contains a part dedicated to ethical considerations.

## II. RESEARCH METHODOLOGY

### A. INTRODUCTION

I devote this chapter to the research methodology applied to this research, the data collection methods used in this research and an analysis of the two (section D). I also explain reasons why particular research methods were not employed in this project.

The following subsection of this chapter is divided into the doctrinal, non-doctrinal and comparative approaches to research. Subsection C is dedicated to an analysis of qualitative, quantitative and mixed methods of research, and strategies of inquiry associated with them, eg a case study, hermeneutics, a survey, which were either applied or rejected in this project.

In the following subsection, I also refer to philosophical worldviews (postpositivist, social constructivist and pragmatic), on which my research is based.

Finally, the issue of ethics, which I had to address while conducting this research, is distinguished as a part of this so-called research design<sup>71</sup>.

### B. RESEARCH DESIGN:

#### DOCTRINAL, NON-DOCTRINAL AND COMPARATIVE RESEARCH

##### 1. Doctrinal approach to research and its application to corporate governance

Generally speaking, this research is a combination of both doctrinal and non-doctrinal research.

The doctrinal approach is commonly known in law as ‘black letter law’<sup>72</sup>. Salter and Mason<sup>73</sup> argue that the main goal of doctrinal analysis is to disclose ‘implications and assumptions’ out of existing rules and precedents, seeing it as a coherent system. For Hofheinz<sup>74</sup> these are simply ‘(...) the rules applicable to a particular area of the law, stated (often in outline form), without

---

<sup>71</sup> See John W. Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (3rd edn, Sage Publications 2009) 5-11.

<sup>72</sup> Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Longman Pub Group 2007) 44.

<sup>73</sup> *ibid.*

<sup>74</sup> Walter Wm. Hofheinz, ‘Legal Analysis’ (1997) <<http://www.hofheinz.com/LANLSYS.php>> accessed 12 October 2012.

application to the particular facts and circumstances of a hypothetical or real legal problem, plus the pattern of questions necessary to apply those rules in a logical manner.’ The doctrinal approach is thus nothing else than an analysis of statutes, precedents and academic work, combined with the ability of researchers to evaluate the implications arising from these texts.

Due to the fact that the issue of corporate governance is subject to legal regulation, it was necessary to precede my research with an analysis of legal acts, as well as other documents referring to them, such as commentaries, precedents, court rulings, journal articles and textbooks. Their availability in both hard copy and electronic forms also contributed to the decision to use the doctrinal approach in this project. There was no danger that some ethical difficulties associated with empirical fieldwork would appear here, as gathering public documents does not raise them<sup>75</sup>.

On the other hand, restricting myself to using only the doctrinal approach would be insufficient in relation to this research, whose agenda is to determine the possibility of the hybridisation of corporate governance in Poland. Salter and Mason<sup>76</sup> rightly note that the focus on law itself precludes researchers from ‘an imaginative reconstruction of how law could, in principle, be substantially different from how it currently is and operates.’

An alternative to doctrinal research is the non-doctrinal approach to research, which confronts a legal problem with society members, actual facts and circumstances.

## **2. Non-doctrinal approach to research and its application to corporate governance**

The non-doctrinal approach to research is also known as ‘law in action’<sup>77</sup> or ‘law in context’<sup>78</sup>. It is based on the social constructivist worldview, which assumes that all knowledge, including the most basic, is derived from and maintained by social interactions<sup>79</sup>. People interact ‘with the understanding[,] that their respective perceptions of reality are related, and as they act upon this understanding[,] their common knowledge of reality becomes reinforced’<sup>80</sup>. Accordingly, non-doctrinal legal research is ‘(...) the social effects of the law, legal process, institutions, and services’<sup>81</sup>. It can ‘produce empirical results that question key tenets of the black letter tradition’s

---

<sup>75</sup> Salter & Mason (n 72) 110.

<sup>76</sup> *ibid* 108.

<sup>77</sup> See, for example, Paul D. Carrington and Erika King, ‘Law and the Wisconsin Idea’ (1997) 47 *Journal of Legal Education* 297.

<sup>78</sup> See, for example, Paul Havemann, ‘“Law in Context” – Taking Context Seriously’ [1995] 8 *Waikato Law Review* <[www.nzlii.org/nz/journals/WkoLRev/1995/index.html](http://www.nzlii.org/nz/journals/WkoLRev/1995/index.html)> accessed 17 November 2012.

<sup>79</sup> Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor 1967) 21.

<sup>80</sup> *ibid*.

<sup>81</sup> Salter & Mason (n 72) 126.



emphasis upon formal rules as vital devices for minimising unbridled executive and administrative discretion'<sup>82</sup>. It can also investigate issues that '(...) are simply beyond the abilities of doctrinal analysis', eg a dissertation could aim to clarify the reasons for which certain kinds of legal regulation can be expected to fail to consistently achieve their stated objectives in specific contexts, including pan-European forms of legal regulation through the implementation of directives<sup>83</sup>.

Like the doctrinal approach to research, the non-doctrinal approach has its strengths and weaknesses. One strength is certainly the fact that it refers to the lived experiences of a group in society<sup>84</sup>. As a consequence, the utilisation of the approach expands the scope of legal analysis beyond law reports and statutes to include the social, economic and political factors shaping the emergence and enforcement of legal regulations<sup>85</sup>. One of the weaknesses is that participants of socio-legal research are often tied indistinguishably to specific liberal and radical political agendas, which have an impact on their objectivity and subsequently the overall research outcome<sup>86</sup>. Moreover, the presence of individuals in empirical research raises serious ethical difficulties, namely the necessity of ensuring their privacy and confidentiality<sup>87</sup>.

Typical methods of socio-legal studies are an interview and an observation. I did not utilise an observation as a research method in this project. Instead, I employed structured and unstructured interviews to research chosen issues and fill the existing gap in knowledge on corporate governance in Poland.

### **a) Interviews**

Structured interviews (also known as 'standardised interviews'<sup>88</sup>) use questionnaires based on prearranged and 'standardised', or identical sets of questions<sup>89</sup>. The very formal character of structured interviews is the reason why they are used to collect quantifiable data (thus, they are also referred to as 'quantitative research interviews')<sup>90</sup>.

Unstructured interviews (also known as 'non-standardised interviews' and 'in-depth interviews'<sup>91</sup>) are based on open questioning, so there is no predetermined list of questions to work

---

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid* 178.

<sup>85</sup> *ibid* 177.

<sup>86</sup> Colin Campbell and Paul Wiles, 'The Study of Law in Society in Britain' (1976) 10 *Law & Society Review* 547.

<sup>87</sup> Salter & Mason (n 72) 180.

<sup>88</sup> See Mark Saunders, Paul Lewis and Adrian Thornhill, *Research Methods for Business Students* (Financial Times Prentice Hall 2012) 46.

<sup>89</sup> *ibid.*

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid* 374.

through<sup>92</sup>. The researcher prepares only a list of themes and possibly some key questions to be covered (although their use may differ from interview to interview). The interviewee is given the opportunity to talk freely about an event, behaviour and beliefs in relation to the topic area. This protects interviewees from getting distracted by excessive guiding.<sup>93</sup>

These two types of interviews, applied to this research, enabled me to perceive an 'imaginative reconstruction of how law could, in principle, be substantially different from how it currently is and operates'<sup>94</sup>, which is the purpose of the second and third research question (see chapter I). The actual attitude of the business environment to possible hybridisation of Polish corporate governance also facilitated an analysis of my findings on the strengths and weaknesses of the present model of corporate governance in Poland (my first research question; see chapter I), taken from my doctrinal research.

It should be added that I mainly arranged structured interviews to gather more statistical data for this project. I assumed that sole entrepreneurs and members of partnerships, who were invited to take part in structured interviews, would not be interested in answering my questions extensively, as they were interviewed by questionnaire and might feel that their knowledge of corporate governance and related issues was not sufficient. However, my assumptions turned out to be mistaken. The majority of those participants answered my questions almost as comprehensively as participants of unstructured interviews – corporate directors and supervisors. This had a significant impact on the degree to which my research objectives were fulfilled, which is discussed in detail in chapter VII.

The outcome of these interviews allowed me to avoid making observations in this research.

## **b) Observations**

The main similarity between observations and interviews is probably the degree of participation of a researcher in the research. It can also vary during unstructured observations: 'At one extreme, the researcher can be a complete participant, being another member of the group involved. At the other extreme, the researcher might 'take a back seat', not taking a prominent role when there is action, or have his role agreed [upon] as being the researcher in their midst'<sup>95</sup>. Here, the identity of the observer is exposed to other members of the group. Meanwhile, it is possible to hide the fact

---

<sup>92</sup> *ibid.*

<sup>93</sup> *ibid.* 44.

<sup>94</sup> Salter & Mason (n 72) 108.

<sup>95</sup> Colin Robson, *How to do a Research Project: A Guide for Undergraduate Project* (Blackwell Publishing 2007) 84.

that the group is being observed for research purposes when the researcher is its active member<sup>96</sup>.

The application of unstructured observations to corporate governance would not be possible. An observation of corporate authorities without their consent would raise serious ethical issues, and might result in criminal liability. There is only a small possibility that a company would give such permission. Furthermore, some technical difficulties could arise while observing corporate officials. They could perform their duties away from the observed space and at a different time. Finally, an observation of people from the 'back seat' would not allow the researcher to ask the type questions which could clarify unclear issues.

In addition, the research method of a structured observation might turn out to be unsatisfactory while doing research on corporate governance in Poland.

As Saunders, Lewis and Thornhill<sup>97</sup> declare, '[b]oth the full participation in observation and taking the 'back seat' allow researchers to determine reasons for which certain things occur.' This differentiates an unstructured observation from a structured observation. A structured observation is quantitative and is more concerned with the frequency of actions. So, its function is to say how often things happen rather than why they happen.<sup>98</sup> My research, however, aims to determine the reasons for which corporate governance in Poland operates in a particular way and the way in which it might operate. It is not focused on the frequency of certain occurrences within corporate governance. Thus, a structured observation would not bring a sufficient amount of information to answer my research questions.

### **3. Comparative research and its application to corporate governance**

My research on corporate governance largely takes the form of a comparative analysis. As O'Reilly<sup>99</sup> argues, such an analysis is meaningful because by researching other countries' practices, researchers are better able to understand their own countries' practices:

'On an instrumental level, this means the borrowing of ideas from other countries in the spirit of learning from one context into another. On a less instrumental dimension, this also allows researchers to reflect upon their own social systems and cultural ways of behaving.'

---

<sup>96</sup> *ibid.*

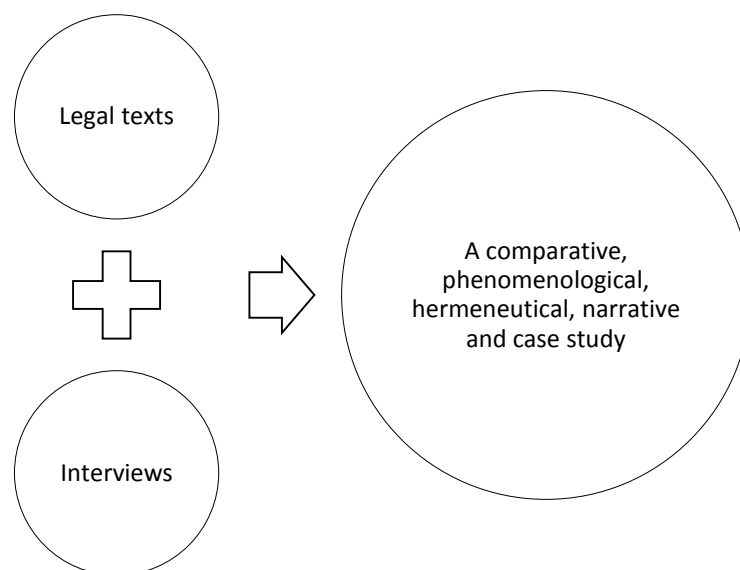
<sup>97</sup> Saunders, Lewis & Thornhill (n 88) 342.

<sup>98</sup> *ibid* 340.

<sup>99</sup> Jacqueline O'Reilly, 'Theoretical Considerations in Cross-national Employment Research' (1996) 1 (1) Sociological Research Online <<http://www.socresonline.org.uk/1/1/2.html>> accessed 20 November 2012.

As a result, this approach facilitates more critical, questioning attitudes towards law by undermining the ‘taken for granted’ positions and practices. It does so by highlighting the relative peculiarities and distinctive features of a particular version of ‘law’ or a specific type of legal response to an issue.<sup>100</sup>

Salter and Mason<sup>101</sup> rightly note that comparative research might be very time-consuming and, in particular, difficult to timetable accurately. It can be added that an analysis of a foreign system of law, which the researcher is not familiar with, can be very intricate and provide numerous occasions to lose the focus of the research. For example, while conducting this research, I learnt on several occasions that a legal act has been nulled and replaced by another act. Another disadvantage of comparative research is limited access to documents, mainly legal, in the language of a researcher. This research embraced seven legal systems, of which the Malaysian and Japanese ones have their legal documents published mainly in their national language. Thus, I had to rely on either legal acts’ translations found on the Internet or journal articles available in English. In this case, the fact that some professional business and governmental web pages are accessible in English, turned out to be invaluable.



**Figure 3.** Research methodology applied to corporate governance

---

<sup>100</sup> Salter & Mason (n 72) 189.

<sup>101</sup> *ibid.*

## C. RESEARCH DESIGN:

### QUALITATIVE, QUANTITATIVE AND MIXED METHODS RESEARCH

The other methodological division is a division into qualitative and quantitative research. Saunders *et al.*<sup>102</sup> argue that many business and management research designs are likely to combine qualitative and quantitative elements. In this way qualitative and quantitative research may be viewed as two ends of a continuum, which in practice are often mixed. My research on corporate governance in Poland is also predominantly qualitative.

#### 1. Qualitative research and its application to corporate governance

Qualitative research can be defined simply as ‘(...) non numerical and contrasted as such with quantitative (numerical) research’<sup>103</sup>. But, it can also be defined in a slightly more expanded way. The leading writers on qualitative research, Denzin and Lincoln<sup>104</sup>, describe the approach as follows:

‘Qualitative research is a situated activity that locates the observer in the world. It consists of a set of interpretative, material practices that make the world visible. These practices transform the world. They put the world into a series of representations, including field notes, interviews, conversations, photographs, recordings, and memos to the self.’

Creswell<sup>105</sup> verbalises a definition that relies less on sources of information, but conveys similar ideas: ‘Qualitative research is an inquiry process of understanding based on distinct methodological traditions of inquiry that explore a social or human problem. The researcher builds a complex, holistic picture, analyses words, reports detailed views of informants, and conducts the study in a natural setting.’

The following strategies of inquiry (also known as approaches to inquiry<sup>106</sup> or research

---

<sup>102</sup> Saunders, Lewis & Thornhill (n 88) 161.

<sup>103</sup> Ian Dobinson and Francis Johns, ‘Qualitative Legal Research’ in Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) 16.

<sup>104</sup> Norman K. Denzin and Yvonna S. Lincoln, *Handbook of Qualitative Research* (2nd edn, Sage Publications 2000) 3.

<sup>105</sup> John W. Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Traditions* (Sage Publications 1998) 15.

<sup>106</sup> John W. Creswell and Vicki L. Plano Clark, *Designing and Conducting Mixed Methods Research* (1st edn, Sage Publications 2007) 34.

methodologies<sup>107</sup>) are distinguished within qualitative research: phenomenological inquiry, hermeneutical inquiry, narrative inquiry, case study, grounded theory and ethnography. While the grounded theory and ethnography did not match my research objectives, the other approaches to inquiry fulfilled the role well.

### **a) Phenomenological inquiry**

Phenomenological research is '(...) a design of inquiry coming from philosophy and psychology in which a researcher describes lived experiences of individuals about a phenomenon as described by participants. This description concludes in the essence of the experiences for several participants who have all experienced the phenomenon.'<sup>108</sup>

This design has a solid philosophical underpinning and normally includes conducting interviews<sup>109</sup>.

Phenomenological research has already largely been elaborated on in the section discussing non-doctrinal research. The social constructivist worldview, on which the non-doctrinal approach is based, has its roots in phenomenology<sup>110</sup>.

In the case of this research, the phenomenon is corporate governance, with respect to which Polish business people, familiar with its mechanism, expressed their opinions during structured and unstructured interviews, described throughout this section. These opinions were subsequently subject to my analysis. The most valuable ones for this research can be found in chapter VI.

### **b) Hermeneutical inquiry**

Hermeneutics ('the art or science of interpretation'<sup>111</sup>) emerged from biblical studies; it aimed to be a science of interpretation. Philosophically, hermeneutics discards the so-called 'correspondence theory of truth'. Generally speaking, 'correspondence theories separated facts from values via methodology, offered the researcher as a neutral or objective figure, and sought

---

<sup>107</sup> Donna M. Mertens, *Research Methods in Education and Psychology: Integrating Diversity with Quantitative and Qualitative Approaches* (Sage Publications 1998) 57.

<sup>108</sup> Creswell (n 71) 14.

<sup>109</sup> *ibid.*

<sup>110</sup> *ibid* 8.

<sup>111</sup> William R. Trumble (ed), *Shorter Oxford Dictionary* (6th edn, Oxford University Press 2007) 1157.

verification of phenomena in the generalizability and regularity of occurrences'<sup>112</sup>. Hermeneutics, on the other hand, tends to reject that there is a truth 'out there' with which 'facts' corresponded: '[s]ome 'perspectives' (...) [are] more defensible than others, but the idea of objective truth (...) [is] an illusion'<sup>113</sup>. Instead, 'it [emphasises] understanding as a situated event in terms of individuals and their situations – as an inevitably prejudiced viewpoint.'<sup>114</sup>

It can hardly be denied that legal scholars are frequently interpreting texts and arguing about a choice between deviating interpretations. In this way, legal doctrine is a hermeneutic discipline, in the same way as is, for instance, the study of literature, or to a slightly smaller extent, history. 'Interpreting texts has been the core business of legal doctrine since it started in the Roman Empire.'<sup>115</sup>

In a hermeneutic discipline, 'texts and documents are the main research object and their interpretation, according to standard methods, is the main activity of the researcher'<sup>116</sup>. As Hoecke<sup>117</sup> argues, this is clearly the case with legal doctrine.

With respect to this research, the necessity of undertaking legal interpretation mainly occurred while conducting interviews, as interviewees' opinions had to be appropriately understood in order to formulate further questions for them and converse with them at an appropriate level. Subsequently, I conducted a comparative analysis of all corresponding opinions gathered during interviews, which required additional interpretations.

I also found it necessary, for further analysis and final conclusions, to explain the meaning of some statements included in various documents and legal provisions. In fact, it embraced the majority of legal acts that I had to study in the course of this research, including the ones most fundamental for Polish corporate governance, namely the Company Code of 2000 and the Privatisation Act.

Each text interpretation required arguments when differing interpretations could rationally be sustained. For example, it is hard to believe that members of the management board in the majority of LLCs do not receive remuneration, despite the fact that the Company Code does not regulate this issue. Thus, it must belong to the discretion of shareholders to decide whether the directors receive remuneration.<sup>118</sup>

Actually, interpretation and argumentation cannot be detached from each other, both in

---

<sup>112</sup> David Heywood and Ian Stronach, 'Philosophy and hermeneutics' in Bridget Somekh and Cathy Lewin, *Research Methods in the Social Sciences* (Sage Publications 2005) 115.

<sup>113</sup> *ibid.*

<sup>114</sup> *ibid.*

<sup>115</sup> Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2013) 4.

<sup>116</sup> *ibid.*

<sup>117</sup> *ibid.*

<sup>118</sup> This issue is developed in further detail in chapter V 'Corporate Governance in Poland'.

legal doctrine and in legal practice<sup>119</sup>. Hoecke<sup>120</sup> states as follows: 'So, legal doctrine and legal practice are both hermeneutic and argumentative, but interpretation and argumentation appear to be roughly two sides of the same activity, in which interpretation is the goal and argumentation the means for sustaining that interpretation.'

### **c) Narrative inquiry**

While 'interpretation is the goal and argumentation the means for sustaining that interpretation'<sup>121</sup>, narration is undeniably a part of both. Czarniawska<sup>122</sup> defines it as 'a spoken or written text giving an account of an event/action or series of events/actions, chronologically connected.' In addition, Creswell<sup>123</sup> stresses the human participation in narrative inquiry. For him it '(...) consists of focusing on studying one or two individuals, gathering data through the collection of their stories, reporting individual experiences, and chronologically ordering the meaning of those experiences (or using life course stages).' I take such an approach to narration in chapter VI, in which I analyse experiences of individuals participating in the management of a business.

### **d) Case studies**

Another approach to inquiry applied to this research was case study research.

Admittedly, Stake<sup>124</sup> argues that case study research is not a methodology but a choice of what is to be studied (eg a case within a bounded system), but others present it as a strategy of inquiry, a methodology, or a comprehensive research strategy<sup>125</sup>.

According to Eisenhardt<sup>126</sup>, case study research can be defined as 'a research strategy which focuses on understanding the dynamics present within single settings.' Yin and Creswell<sup>127</sup> develop this definition: case study research involves the study of an issue explored through one or more cases within a real-life, contemporary context or setting.

---

<sup>119</sup> Hoecke (n 115) 5.

<sup>120</sup> *ibid.*

<sup>121</sup> *ibid* 4.

<sup>122</sup> Barbara Czarniawska, *Narratives in Social Science Research* (Sage Publications 2004) 17.

<sup>123</sup> Creswell (n 105) 70; see also Geoffrey Shacklock and Laurie Thorp, 'Life History and Narrative Approaches' in Somekh & Lewin (n 112) 156.

<sup>124</sup> Creswell, *ibid* 97; see also Robert E. Stake, *The Art of Case Study Research* (Sage Publications 1995).

<sup>125</sup> Creswell, *ibid.*

<sup>126</sup> Kathleen M. Eisenhardt, 'Building Theories from Case Study Research' (1989) 14 (4) *The Academy of Management Review* 532.

<sup>127</sup> Robert K. Yin and John W. Creswell in Creswell (n 105) 97.



The most serious difficulty inherent in qualitative case study development is that the researcher has to recognise the case. The case study researcher has to decide which 'bounded' system to study, '(...) recognizing that several might be possible candidates for this selection and realizing that either the case or an issue, which a case or cases are selected to illustrate, is worthy of study'<sup>128</sup>. The researcher has to consider whether to study a single case or multiple cases. 'The study of more than one case dilutes the overall analysis; the more cases and individual studies, the less depth in any single case. When a researcher chooses multiple cases, the issue becomes, 'How many cases?''<sup>129</sup>

Cases utilised in this research are corporate governance models that are in force in several countries. In this regard, the following definition of a case seems to be more appropriate: '(...) an instance of the occurrence, existence, etc., of something; the actual state of things; a question or problem of moral conduct; matter; situation, circumstance, plight; a person or thing whose plight or situation calls for attention.'<sup>130</sup>

The corporate practices of several companies would not illustrate the major problems that occur in the corporate governance system of the country, eg some companies in Poland appoint independent supervisors, some do not; companies that appoint independent supervisors might have a highly consolidated ownership structure, while it might be dispersed in other companies. As a consequence, it would cause a number of difficulties to select the most appropriate companies, in particular countries, in order to compare their governance to each other. Moreover, the depth of research could be affected by the fact that company authorities would not permit access to all information.

## **e) Ethnography**

Discussing a case study, it is also worth drawing attention to the fact that '[t]he entire culture-sharing group in ethnography may be considered a case (...)'<sup>131</sup>. However, it must be noted that the intent in ethnography is to determine how the culture works rather than to understand an issue or problem using the case as a specific illustration<sup>132</sup>.

As a process, ethnography implicates lengthy observations of a 'culture-sharing' group, most often through participant observation, in which the researcher is immersed in the day-to-day

---

<sup>128</sup> Creswell, *ibid* 101.

<sup>129</sup> *ibid*.

<sup>130</sup> Free Dictionary by Farlex <[www.thefreedictionary.com/case](http://www.thefreedictionary.com/case)> accessed 15 March 2014.

<sup>131</sup> Robert K. Yin and John W. Creswell in Creswell (n 105) 101.

<sup>132</sup> *ibid*.

lives of the people and observes and interviews the group participants<sup>133</sup>. Ethnographers describe and interpret the shared and learned patterns of values, behaviours, beliefs, and language of the group<sup>134</sup>.

The aim of this research was not to investigate the values, behaviours and language of the corporate environment in Poland, but rather legal devices within corporate governance, which cause problems in the functioning of companies, eg financial misappropriations. Nevertheless, these areas did end up being addressed, as was the interaction between people involved in business in Poland. This is particularly noticeable in chapter VI, which is dedicated to an analysis of interviews with business practitioners.

## **f) Grounded theory**

Finally, the grounded theory as a research methodology was rejected in this project.

The intent of a grounded theory study is to move beyond description and generate or discover a theory, a 'unified theoretical explanation'<sup>135</sup>. This differentiates grounded theory research from narrative research which is focused on individual stories told by participants, and phenomenology emphasising the common experiences for a number of individuals<sup>136</sup>. Grounded research participants are also unlikely to be situated in the same place or interact frequently to the extent that they develop shared patterns, behaviours, beliefs, or a language. Still, like an ethnographer, a grounded theory researcher develops a theory from examining many individuals who share in the same process, action, or interaction.<sup>137</sup> A key idea is that this 'theory development does not come 'off the shelf', but rather is generated or 'grounded' in data from participants who experienced a process or were involved in an action or interaction.'<sup>138</sup>

The aim of my research was to neither generate nor discover a theory. The scope of research merely allowed me to learn its main weaknesses and the attitude of people involved in business activity to particular changes which could be made to corporate governance in Poland.

The grounded theory study is a process of constant comparison, in which '[e]ach item of data collected is compared with others, as well as against the codes being used to categorise data

---

<sup>133</sup> Creswell, *ibid* 90.

<sup>134</sup> Marvin Harris in *ibid*.

<sup>135</sup> Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage Publications 2007) 107.

<sup>136</sup> Creswell (n 105) 83.

<sup>137</sup> *ibid* 90.

<sup>138</sup> Corbin & Strauss (n 135).

(...)<sup>139</sup>. The following codes are used to categorise data:

- open coding, which means coding the data for its main categories of information;
- axial coding, in which the researcher finds one open coding category to focus on (called the 'core' phenomenon), and goes back to the data and generates categories around this principal phenomenon;
- selective coding, in which the researcher takes the model and develop propositions (or hypotheses) that interconnect the categories in the model or gathers a story that describes the interrelationship of categories in the model.<sup>140</sup>

Continuous comparison involves moving between inductive (generalising from the specific to the general) and deductive (generalising from the general to the specific) thinking<sup>141</sup>. As a researcher codes data into categories, a relationship might begin to suggest itself between specific codes (here, the researcher is using inductive thinking because he or she will be linking specific codes to form general proposition)<sup>142</sup>. This emerging interpretation will need to be 'tested' through collecting data from new cases (here, the researcher will use deductive thinking 'to test the abstract generalisation back to a new set of specific cases, to see if it stands up as an explanatory relationship to form a higher-level code')<sup>143</sup>.

Both deductive and inductive thinking are an integral part of legal inference<sup>144</sup>. So, it must also be present during research on corporate governance. For example, if we observe an improvement in performance of a small company after it has implemented a set of good practices, this means that a big company is also likely to benefit from a similar change in its business conduct (inductive thinking). A lack of an appropriate number of independent supervisors in the Japanese job market means that we are likely to observe a similar difficulty in Poland, where this market is less developed (deductive thinking).

## 2. Quantitative research and its application to corporate governance

As I have mentioned, I also applied the quantitative approach to research in this project. What is quantitative research?

---

<sup>139</sup> Saunders, Lewis & Thornhill (n 88) 186.

<sup>140</sup> Strauss & Corbin (n 135) 59.

<sup>141</sup> *ibid.*

<sup>142</sup> *ibid.*

<sup>143</sup> *ibid.* See also Jo Reichertz, 'Abduction: The Logic of Discovery of Grounded Theory' in Antony Bryant and Kathy Charmaz (eds), *The Sage Handbook of Grounded Theory* (Sage Publications 2007) 29.

<sup>144</sup> See, for example, Zbigniew Ziemiński, *Logika Praktyczna* (Wydawnictwo Naukowe PWN 2004) 150-193.

Quantitative research is generally associated with positivism, which assumes that research is based on testing, verifying and refining existing theories<sup>145</sup>. Thus, problems studied by postpositivists reflect the need to identify and assess the causes that influence outcomes, such as those found in experiments. In other words, quantitative research examines relationships between variables, which are measured numerically and analysed using a range of statistical techniques<sup>146</sup>.

This type of research is usually associated with a deductive approach, when the focus is on using data to test hypothesis. However, it may also incorporate an inductive approach, where data is used to develop hypothesis.<sup>147</sup>

Quantitative research is principally associated with experimental and survey research strategies. A survey research strategy is normally conducted through the use of questionnaires or structured interviews or, possibly, structured observations (analysed above)<sup>148</sup>.

The survey strategy is common in business and management research, and is most frequently used to answer 'what', 'who', 'where', 'how much' and 'how many' questions<sup>149</sup>. It therefore tends to be used for explanatory and descriptive research<sup>150</sup>. The data collected by a survey is unlikely to be as wide-ranging as those collected by other research strategies<sup>151</sup>. For example, there is a limit to the number of questions that any questionnaire can contain 'if the goodwill of the respondent is not to be presumed on too much'<sup>152</sup>.

This is the reason why a survey was not suitable for my research. It is exploratory, and therefore the main objective was to find out whether it is possible to implement hybrid corporate governance in Poland. In such a case, I required greater freedom in the choice of questions while conducting my non-doctrinal research (unstructured interviews). Nonetheless, my participants received a paper with a number of questions, which enabled me to collect more quantifiable data (structured interviews). They, however, differentiated from typical survey questions, as they had an open character<sup>153</sup>.

Conducting an experiment was also an inappropriate research method for this project.

The most convenient place for carrying out an experiment is a laboratory. There, the researcher has better control over aspects of the research process, such as sample selection and the context within which the experiment occurs.<sup>154</sup>

---

<sup>145</sup> Creswell (n 71) 7.

<sup>146</sup> Tim May, *Social Research: Issues, Methods and Process* (4th edn, Open University Press 2011) 78.

<sup>147</sup> Creswell (n 71).

<sup>148</sup> Saunders, Lewis & Thornhill (n 88) 162.

<sup>149</sup> *ibid* 177.

<sup>150</sup> *ibid* 178.

<sup>151</sup> Creswell & Clark (n 106) 28.

<sup>152</sup> *ibid*.

<sup>153</sup> Saunders, Lewis & Thornhill (n 88) 165.

<sup>154</sup> *ibid* 176.

It is a common practice to run a company from a designated place, such as a room or a building, or a number of buildings. It is also possible to keep control over some aspects of doing business, including the decision making process and people management. However, establishing a company for experimental purposes would be costly and, in some cases, might be considered illegal. For example, it would not be legally possible to establish in Poland a company with a one-tier board system, because its actions towards third persons would be void by law<sup>155</sup>.

Methodologists<sup>156</sup> also explain that the extent to which the findings from a laboratory experiment are able to be generalised to all organisations is likely to be lower than for a field (organisation) based experiment. With respect to corporate governance, this issue has already been explained in the section dedicated to case study research. I explain there that a case of a company or of a number of companies, in a particular country, might not illustrate all the inefficiencies that a corporate governance model suffers from.

### **3. Mixed method approach and its application to research on corporate governance**

As I have already declared, my research is a combination of qualitative and quantitative research. This is, thus, the so-called mixed method approach to research.

The approach is based on the pragmatic worldview, 'opening the door to multiple methods, different worldviews, and different assumptions, as well as different forms of data collection and analysis'<sup>157</sup>. Speaking precisely, instead of focusing on methods, researchers emphasise the research problem and use all approaches available to understand the problem<sup>158</sup>.

In this project, I focused on qualitative research because it looks at context and social meaning and how it affects individuals<sup>159</sup>. So, this type of research gave me the possibility 'to empower individuals to share their stories, hear their voices (...)'<sup>160</sup>. It was necessary to answer my research questions. On the other hand, the social aspect made me profoundly involved in this project, which gave me rather a subjective view of this study and its participants<sup>161</sup>. This meant that

---

<sup>155</sup> Such a company would not be registered with the National Court Register, which is necessary to make a company operate legally; Art. 163-167, 306-310 and 316-320CCC.

<sup>156</sup> Saunders, Lewis & Thornhill (n 88) 177.

<sup>157</sup> Creswell (n 71) 11.

<sup>158</sup> See Gretchen B. Rossman and Bruce L. Wilson, 'Numbers and Words: Combining Quantitative and Qualitative Methods in a Single Large-scale Evaluation Study' (1985) 9 (5) Evaluation Review 627.

<sup>159</sup> Creswell (n 105) 48.

<sup>160</sup> *ibid.*

<sup>161</sup> This issue is also discussed by Saunders, Lewis & Thornhill (n 88) 169.

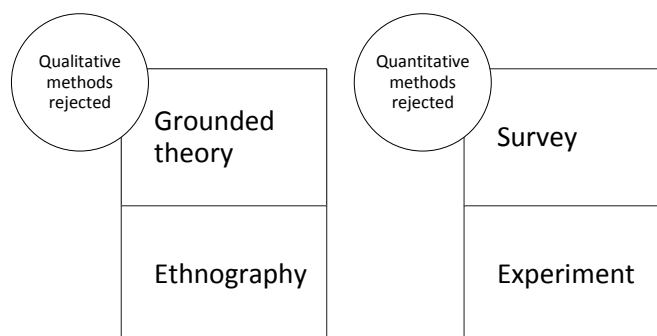
I was likely to interpret this research according to my own biased view, which skewed the data gathered.

The qualitative character of my research was also useful during its early stages, when I was unsure of exactly what would be studied or what to focus on<sup>162</sup>. In addition, it did not require a strict design plan before it began<sup>163</sup>. This gave me freedom to let this study develop more naturally. I also gained more detailed and rich data in the form of broad written descriptions<sup>164</sup>.

A serious disadvantage of my qualitative study was the fact that it was time-consuming and lasted for months<sup>165</sup>.

This research was also quantitative. I came across quantifiable data while analysing legal documents and gathered such data during my interviews with business people in Poland. This turned out to be beneficial because my findings became more objective this way<sup>166</sup>.

In fact, I could not fully apply quantitative research to this project, as this type of research does not discuss the meaning that things have for different people and their natural setting<sup>167</sup>. So, the application of quantitative research would not enable me, for example, to find out what changes – according to the Polish business environment – should be made to corporate governance in Poland.



**Figure 4.** Methodology rejected in research on corporate governance

<sup>162</sup> See Creswell (n 105) 48.

<sup>163</sup> *ibid.*

<sup>164</sup> *ibid.*

<sup>165</sup> *ibid.*

<sup>166</sup> *ibid*; May (n 146) 19.

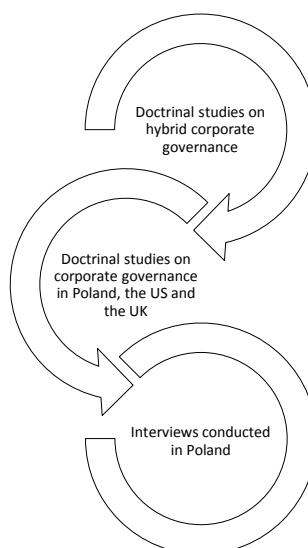
<sup>167</sup> May, *ibid.*

## D. COLLECTION AND AN ANALYSIS OF DATA ON CORPORATE GOVERNANCE

### 1. Data collection

Once corporate governance in Poland and the possibility of its hybridisation became the subject of this research, I undertook a literature review. It involved the relatively new occurrence of hybrid corporate governance in the world and the functioning of corporate governance in Poland. As chapter I shows, it was also necessary to refer to the American and British corporate governance systems.

After over a year of reading on these topics and with a firm understanding of the majority of problems arising from them, I began a set of interviews within the Polish business environment. Their main goal was to find out about the practical application of certain rules of corporate law and the actual functioning of the internal structure of companies in Poland. They also gave me the opportunity to learn the views of business practitioners concerning corporate governance, for example about the prospect of implementing a one-tier board system in Poland. Thus, they allowed me to partially fill a significant gap in knowledge of corporate relations in Poland.



**Figure 5.** Data collection scheme applied to research on corporate governance

The two first interviews were a pilot study, which enabled me to prepare a complete list of questions for the remaining interviewees, and also to find out which data would finally be available and the way in which it would be accessed.

While conducting interviews, I was at the same time reviewing literature while conducting interviews. In fact, I finished reviewing the literature a day before I submitted this thesis. It was

necessary to have updated knowledge of hybrid corporate governance and continuously occurring amendments to corporate law in Poland.

In total, I conducted 37 interviews in four Polish regions (Lower Silesian, Lubusz, Greater Poland, Pomeranian and Masovian). My interviewees were: board members (14), minor shareholders (11), employees of limited companies (2), sole entrepreneurs (6; of which four are suppliers for limited companies) and members of partnerships (4; including employees of two legal firms). Recruitment criteria for the research participants were either vast work experience within corporate authorities or wide knowledge of corporate practice in Poland.

23 of the 37 interviews were structured. Interviewees received a sheet of paper with my questions and they were asked to justify their answers<sup>168</sup>. After they returned the question sheets, I did not ask them any additional questions. Nevertheless, shareholders and two corporate lawyers (members and employees of professional partnerships at the same time) received a different question sheet (with one additional question) than the other participants who took part in the structured interviews.

All corporate officials took part in the unstructured interviews, which took the form of an open dialogue. However, questions asked during these interviews mirrored those asked in the questionnaire.

Unstructured interviews were either tape recorded (and transcribed), handwritten (interviews conducted by Skype and phone), or conducted via e-mail correspondence (in fact, the majority of interviews were conducted by electronic devices – by e-mail and Skype). The tape recorded interviews were conducted in participants' offices. Interviews conducted via Skype took place away from people in a closed room in a building. This Anglia Ruskin ethics policy requirement is described in greater detail later in this chapter.

All interviews were scheduled to fit around the timetable of participants. It took over two years to conduct them. The first contact was made via a telephone conversation or an e-mail message, during which board members were asked to choose how they would like to be interviewed (by e-mail, Skype, telephone or face to face).

All 37 interviewees gave their consent to take part in this research. Eight other persons initially agreed to participate, but after several months they informed me of their withdrawal from this research, all putting it down to a lack of time. However, they returned partially filled questionnaires. I took their answers into consideration while analysing the data. The other candidates declined to participate straight away. The reasons for the refusal varied from issues of 'confidentiality', 'not familiar enough with corporate law' and 'time shortage'.

The next stage of this research was data analysis.

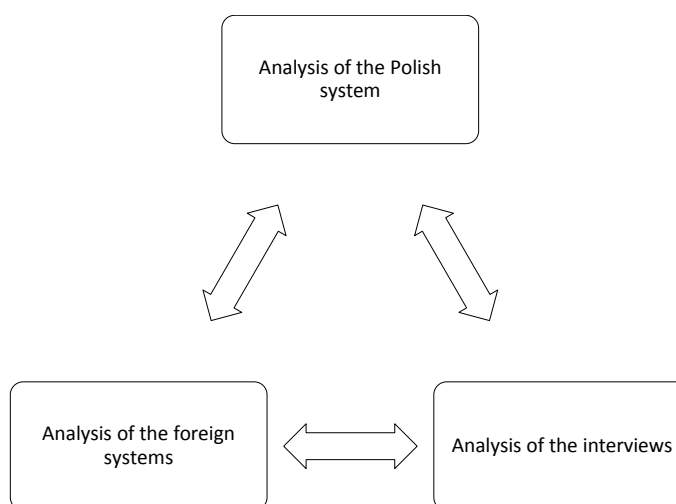
---

<sup>168</sup> The questions used in the interviews are presented in chapter VI.



## 2. Data analysis

While comparing several legal systems, I employed a multiple analysis. I analysed the Polish corporate governance system and subsequently I compared it to selected foreign equivalents, which had also been subject of an analysis. With respect to my interview findings, each of my interview was analysed and, at the final stage, compared with other interviews and the outcomes of my doctrinal research. Therefore, the entire analysis was conducted using a ‘cross findings’ process<sup>169</sup>. Altogether, all findings formulated the so-called ‘integrated findings’ (methodological triangulation) of the research. At this stage, new knowledge emerged.<sup>170</sup>



**Figure 6.** Comparative analysis applied to research on corporate governance

The process of comparing data was preceded by its classification – according to the research questions, the research aims and the conceptual framework that underpinned the research<sup>171</sup>. In interview transcripts and e-mail prints (with respect to interviews conducted by e-mail), each category was marked in a different colour (this process enabled me to group the answers together according to their respective categories). Furthermore, documents were classified according to their binding power – primary legislation, followed by regulation and legal writers<sup>172</sup>.

It was not only geography and corporate power structures that were of my interest while analysing data, but also legal structures in each of the systems investigated by me. Thus, the aim

<sup>169</sup> Norman K. Denzin and Yvonna S. Lincoln, *Strategies of Qualitative Inquiry* (4th edn, Sage 2011) 111; see also Hoecke (n 115) 171.

<sup>170</sup> *ibid.*

<sup>171</sup> Charles Chatterjee, *Methods of Research in Law* (2nd edn, Old Bailey 2000).

<sup>172</sup> *ibid.*

was also to understand the national setting out of which the law arises and is used<sup>173</sup>. Besides this, the national lawyer's normal institutional approach was complemented by a wider social and cultural contextualisation of legal developments in the various systems.

I based my conclusions on the premise that:

- a test for the correctness of a legal solution is whether it makes the law the best it could be<sup>174</sup>,
- a legal solution is compatible when it is predominantly consistent and coherent with the rest of the law<sup>175</sup>, and
- where more than one solution is possible, then the choice is made according to the value perspective that the interpreter thinks is right within the institutional context of that legal system<sup>176</sup>.

Finally, to avoid subjectivity in presenting personal views, I checked whether opinions largely prevailed amongst legal scholars or amongst lawyers in general.

## E. ETHICS IN RESEARCH ON CORPORATE GOVERNANCE

Research involving human subjects requires ethical approval in order to protect the rights and welfare of participants, and minimise the risk of physical and mental harm. These are also followed in order to protect the rights of the researcher to carry out legitimate investigations, as well as the reputation of the University for which the research is being conducted.<sup>177</sup>

Conventional practice and ethical codes support the view that various safeguards should protect the privacy and identity of research subjects<sup>178</sup>. In accordance with research ethics guidelines, the subjects' right to privacy is preserved by keeping the subjects anonymous. The major safeguard to guard against the invasion of privacy is the assurance of confidentiality.<sup>179</sup> This research respected the privacy of the respondents, their anonymity and the confidentiality of the data.

I obtained ethics approval from Anglia Ruskin University Ethics Committee prior to commencing the study. Subsequently, I provided all my interviewees with information sheets

---

<sup>173</sup> See George P. Fletcher, 'Comparative Law as a Subversive Discipline' (1998) 46 *American Journal of Comparative Law* 683.

<sup>174</sup> See Ronald Dworkin, *Law's Empire* (Fontana 1986) 228-238.

<sup>175</sup> See Neil McCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1978).

<sup>176</sup> See John Bell, 'Legal Research and the Distinctiveness of Comparative Law' in Hoecke (n 115) 166.

<sup>177</sup> Anglia Ruskin University, 'Research Student Hand Book 2013' (September 2013) 14.

<sup>178</sup> See, for example, Creswell (n 71) 92-101.

<sup>179</sup> *ibid.*

written in plain language<sup>180</sup>, which included the title of the project, the name of the researcher and how she could be contacted. In addition, these sheets also stated that the participant could ask to withdraw from participation in this project at any time and for any reason.

I also discussed anonymity and confidentiality with my participants. Both were promised in the written form and verbally before I commenced this research. I assured both anonymity and confidentiality both during interviews and at the documentary stage. Accordingly, I conducted interviews in public utility buildings in closed rooms during normal hours of work and away from other people. I promised to keep all transcripts on the hard drive of my password protected computer, and then to destroy them after the submission of the thesis. I either coded or kept the names of my participants on my secured computer. They are also not revealed in this thesis. Participants are either called 'participants' or 'interviewees', or by the name of their business profession. However, the name of the company for which they work is not identified.

## **F. CONCLUSIONS**

In this chapter, I analyse research methods applied and rejected in this research project, including the philosophical worldviews, from which they are drawn, the data collection and the process of its analysis.

Section B is an analysis of the doctrinal and non-doctrinal approaches to research, which were applied in this study. I also briefly elaborate on the meaning of comparative research and the impact that they had on my research. In Section C, I discuss qualitative, quantitative and mixed methods research, and research methodologies distinguished within them. I explain which of them were applied to my research, eg I based my research on a case study (qualitative strategy of inquiry) and some methodologies were rejected, eg I decided not to use a survey as a research methodology (quantitative research). I also refer to such philosophical worldviews as postpositivist, social constructivist and pragmatic, as I based my research on them.

The issue of data analysis applied to this project is discussed in detail in section D. Here, I also describe the research ethics requirements with respect to my research. Finally, I explain the process of data collection while conducting interviews in Poland.

The subsequent chapter is a literature review of hybrid corporate governance. This is also an introduction to an analysis of the Anglo-Saxon models of corporate governance in chapters IV and V and of Polish corporate governance in chapters V and VI.

---

<sup>180</sup> An example of the information sheet and the consent form is attached as Appendix 11 and 12.

### III. LITERATURE REVIEW

#### A. INTRODUCTION

Following Dellinger's<sup>181</sup> standpoint on a literature review, the chapter aims to analyse the 'critical points of current knowledge' on hybrid corporate governance in the world, 'including substantial discoveries as well as theoretical and methodological contributions' to the theme. Such an analysis is necessary to understand what is currently known about the topic, and what needs to be researched to fill gaps in knowledge<sup>182</sup>. A literature review was also used in this research to identify methods of doing research, and to find out where to get support to successfully conduct it<sup>183</sup>. In order to present an in depth analysis of core aspects of worldwide hybrid corporate governance, I limited the review to eighty articles and seven countries (see chapter VII 'Concluding Remarks', dealing with the delimitations of this research).

This chapter begins with an explanation of the notions 'hybrid corporate governance' and 'legal transplant', which is tightly combined with the concept of hybrid corporate governance. This introductory part is then followed by an analysis of particular legal orders in which legislators decided to implement various hybrid solutions to corporate governance (sections D-H). Section B is dedicated to hybrid corporate governance in Poland, in which I present legal literature raising the issue of hybridisation.

---

<sup>181</sup> According to Dellinger, 'a literature review is a text written by someone to consider the critical points of current knowledge including substantive findings as well as theoretical and methodological contributions to a particular topic'. Literature reviews are secondary sources, and as such, do not report any new or original experimental work; Dellinger (n 70). There are other definitions of a literature review, which however, do not differentiate from each other significantly. Hart writes that a literature review can also be interpreted as a review of an abstract accomplishment; Christopher Hart, *Doing a Literature Search: A Guide for the Social Sciences* (Sage Publications 2001) 194. For Lane, a literature review is simply 'a description of the literature relevant to a particular field or topic' (Nancy D. Lane, *Techniques for Student Research: A Practical Guide* (2nd edn, Longman 1996) 58), and for Bell it is 'an account of what has been published on a topic by accredited scholars and researchers' (Judith Bell, *Doing Your Research Project* (3rd edn, Oxford University Press 1999) 28).

<sup>182</sup> A literature review might also be conducted by researchers for personal or intellectual reasons, or because they need to understand what is currently known about a topic and cannot or do not want to do a study of their own; Arlene Fink, *Conducting Research Literature Reviews. From Paper to the Internet* (Sage Publications 1998) 3. A literature review might produce conflicting or ambiguous results or might not adequately cover a topic. Experts are then often called in to help resolve the uncertainty that arises when data is inconclusive or missing; Fink, *ibid* 8.

<sup>183</sup> See Fink, *ibid* 7 and 9. For Fink, a literature review can be used to identify methods of developing and implementing programmes.

## B. THE NOTION OF HYBRID CORPORATE GOVERNANCE

### 1. The Andreasson definition of hybrid corporate governance

Explaining the general meaning of ‘hybrid corporate governance’ is difficult, as the concept is associated with particular legal systems, eg the South African, Japanese, Malaysian ones. In addition, only one paper, namely *Understanding Corporate Governance Reform in South Africa: Anglo-American Divergence, the King Reports and Hybridization*<sup>184</sup>, contains a complete definition of hybrid corporate governance. The author of the article, Andreasson<sup>185</sup>, reports that ‘successful hybrid corporate governance must be capable of addressing both shareholder and stakeholder concerns, and to effectively anchor these concerns in a cultural framework that confers popular legitimacy on the system as a whole.’ Andreasson, however, does not provide any general definition of ‘shareholder and stakeholder concerns’ and the ‘cultural framework’.

What do ‘shareholder and stakeholder concerns’ and a ‘cultural framework’ mean for Andreasson and other researchers? What can we infer from their research in this regard? An answer to these questions is essential for the following reasons:

- one of the hybrid solutions – elaborated in detail later in this thesis – involves a combination of the shareholder and stakeholder approaches to corporate governance, and
- theoretical discussions on corporate governance generally begin with the premise that corporate governance regimes are based on either the shareholder model or the stakeholder model<sup>186</sup>.

Thus, corporate governance regimes are based on either the shareholder model, which is most common in liberal market economies, like the US and UK, or the stakeholder model, typical for coordinated market economies, like Germany and Japan<sup>187, 188</sup>. It should also be added that the corporate governance literature differentiates an Anglo-American ‘outsider’ and a Continental ‘insider’ model<sup>189</sup>. In the legal and financial literature, corporate governance models (and financial

---

<sup>184</sup> Andreasson (n 46).

<sup>185</sup> *ibid.*

<sup>186</sup> Peter A. Hall and David Soskice (eds), *Varieties of Capitalism: the Institutional Foundations of Comparative Advantage* (Oxford University Press 2001) 25.

<sup>187</sup> *ibid.*

<sup>188</sup> In the political economy literature, this split has been referred to as ‘stock market capitalism’ versus ‘welfare capitalism’ (eg Ronald Dore, *Stock Market Capitalism: Welfare Capitalism – Japan and Germany Versus the Anglo-Saxons* (Oxford University Press 2000) 16), and in a more propagated setting as ‘Anglo-Saxon’ versus ‘Rhineland’ capitalism (eg Michael Albert, *Capitalism Against Capitalism* (Whurr Publishers 1993) 27).

<sup>189</sup> Klaus Gugler, Dennis C. Mueller and B. Burcin Yurtoglu, ‘Corporate Governance and Globalization’ (2004) 20 (1) *Oxford Review of Economic Policy* 129.

regulation more broadly) have usually been divided into market-centred, like in the US and UK, and bank-centred, like in Germany or Japan<sup>190</sup>. I refer to both divisions later in this thesis.

According to Andreasson<sup>191</sup>, the shareholder model upholds that 'a corporation is an extension of its owners and ultimately responsible to these owners.' West<sup>192</sup> clarifies that the shareholders own a company and therefore have exclusive rights to define its priorities and to any profit produced, and that only market forces can attain economic effectiveness. In this respect, Andreasson<sup>193</sup> states that this model generally excludes any serious consideration of market interference in achieving the goals of the company, eg reflecting on matters beyond the financial 'bottom line'.

For a later discussion on the shareholder model, it is also worth referring to Pratt's and Zeckhauser's<sup>194</sup> opinion, according to which the shareholder model involves potential conflicts of interest between owners (principals) and managers (agents). Letza, Sun and Kirkbride<sup>195</sup> report that these conflicts are usually resolved by linking managerial rewards to corporate performance, which is measured by share price and exercised by means of stock options.

Contrary to the shareholder model, the stakeholder one perceives a company as a 'social entity', which is responsible and accountable to a wider set of actors beyond its owners<sup>196</sup>. These actors typically include suppliers, customers, employees, government and local communities, which are influenced by the behaviour and performance of a company<sup>197</sup>. A normative version of the stakeholder model assumes that 'the need to take stakeholders into account is an end in itself due to moral obligation and social values that extend beyond the liberal emphasis on the owners'<sup>198</sup>. A descriptive version notes that the considerations of stakeholders (and owners) are taken into account, whereas an instrumental version emphasises the need to be responsible towards stakeholders in order to gain better economic efficiency<sup>199</sup>.

The linkage between economic performance and the stakeholder model has recently been stressed by American researchers, who had observed that a company devoted to social and

---

<sup>190</sup> Franklin Allen and Douglas Gale, *Comparing Financial Systems* (MIT Press 2000) 6.

<sup>191</sup> Andreasson (n 46).

<sup>192</sup> Andrew West, 'Theorising South Africa's Corporate Governance' (2006) 63 (4) *Journal of Business Ethics* 433.

<sup>193</sup> Andreasson (n 46).

<sup>194</sup> John W. Pratt and Richard J. Zeckhauser (eds), *Principals and Agents: The Structure of Business* (Harvard Business School Press 1985) 57.

<sup>195</sup> Steve Letza, Xiuping Sun and James Kirkbride, 'Shareholding versus Stakeholding: A Critical Review of Corporate Governance' (2004) 12 (3) *Corporate Governance: An International Review* 242.

<sup>196</sup> Josef Wieland, 'Corporate Governance, Values Management, and Standards: A European Perspective' (2005) 44 (1) *Business and Society* 74.

<sup>197</sup> West (n 192).

<sup>198</sup> Donaldson & Preston (n 40).

<sup>199</sup> *ibid.*

environmental issues, which are significant to its stakeholders, has ‘superior’ financial performance<sup>200</sup>.

The pro-stakeholder approach in countries where the shareholder model had only previously been in force is the so-called ‘enlightened stakeholder value’, and it has also gained considerable attention in the UK, where the Companies Act of 2006 imposes on corporate directors the duty to – while performing their function – have regard (amongst other matters) for the community and the environment in which the company operates and which might be affected by this operation<sup>201</sup>.

In South Africa, enlightened stakeholder value has recently been pushed forward and turned into the so-called ‘stakeholder inclusivity’, according to which the shareholder does not have a predetermined place of precedence over other stakeholders<sup>202</sup>. The ethical foundation for this concept is the Southern African value system of *Ubuntu*, whose guiding principle can be stated in one sentence: ‘*Ubuntungubuntu*’. Khoza<sup>203</sup> translates it as follows: ‘I am because you are, you are because we are. We are interrelated beings, we operate best when we care about one another.’

The *Ubuntu* principle is a part of the cultural framework, which Andreasson<sup>204</sup> includes with the definition of hybrid corporate governance (see above in this subsection). He does not explicitly state that *Ubuntu* is a component of the cultural framework, but we can deduce that from the context of his paper, according to which ‘[t]he hybridization of South African governance is a result of tensions between a traditional liberal emphasis on individual property rights imbued in the Anglo-American model and the communitarianism inherent in the concept of “African values,” or *ubuntu*.’

Andreasson’s<sup>205</sup> paper also contains the following:

- an analysis of the King I and II codes and the possibility of hybridisation of South African corporate governance in the King III Code through better protection of stakeholders’ interests.
- a referral to the South African corporate tradition, which was shaped by British achievements in this area; and
- the complicated economic situation of South Africa, as a consequence of a colonial legacy of uneven development, extreme inequalities and unsettled state-business relations.

---

<sup>200</sup> See, for example, Verschoor & Murphy (n 38).

<sup>201</sup> Part 10, Chapter 2, section 172.

<sup>202</sup> King (n 34); King Code of Governance for South Africa 2009; 8.1. – 8.3.

<sup>203</sup> Albert Luthuli Centre for Responsible Leadership, ‘Interview Summary Report Compiled by Jess Schulshenk’ (University of Pretoria, August 2012) <[web.up.ac.za/sitefiles/file/2013\\_alcrl\\_Interview%20summary%20report%20web.pdf](http://web.up.ac.za/sitefiles/file/2013_alcrl_Interview%20summary%20report%20web.pdf)> accessed 4 April 2013; see also Andreasson (n 46).

<sup>204</sup> Andreasson, *ibid.*

<sup>205</sup> *ibid.*

Alongside the *Ubuntu* principle, we could assume that these are also components of what Andreasson<sup>206</sup> calls the cultural framework. We need to take into account that this is the only document defining hybrid corporate governance, and entirely dedicated to this issue. Therefore, the fact that Andreasson either analyses those issues or refers to them may not be accidental.

At this point, I would like to mention Ewald's<sup>207</sup> *Comparative Jurisprudence (II): The Logic of Legal Transplant*, in which he argues that the process of borrowing cannot be insulated from a social and economic change in the recipient legal culture. The Andreasson<sup>208</sup> definition of hybridisation, which involves linking the shareholder and the stakeholder approaches to corporate governance and fitting them into a particular cultural framework, contains the element of borrowing from other jurisdictions. Thus, it is reasonable to assume that what Andreasson<sup>209</sup> understands by a cultural framework is the society, law and economy of a country.

While interviewing business people in Poland, I discussed the Andreasson<sup>210</sup> definition of hybrid corporate governance with corporate officials and shareholders (in total 14 people in total). They all agree that Andreasson considered the society, the legal system and economic conditions of South Africa as components of the cultural framework. In addition, one of interviewees<sup>211</sup> pointed out that they are interrelated with each other and shaped by the politics of a country. As he stated, the government, which represents a particular viewpoint on business, creates the law of a country, which determines the life of its citizens, because, among other things, it decides about the economic performance of the country. However, he also noted, that the economy, as well as the society, have a significant impact on the shape of a democratic country's legal system. Citizens choose their representatives in the government, which creates the law of the country. It is also limited in its decisions (for example its legislative initiatives) by the following:

- the scope of the government's competences, which might have been broadened or lessened by the previous government;
- the opinion of the public at large; and
- the current economic situation.

The economic performance of a country depends on a set of decisions made by the government of that country or by the governments of a number of countries, since we live in a globalised world, in

---

<sup>206</sup> *ibid.*

<sup>207</sup> Ewald (n 48). See also Pierre Legrand, 'The Impossibility of Legal Transplants' [1997] *Maastricht Journal of European and Comparative Law* 111; Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1; Ann and Robert B. Seidman, *State and Law in the Developing Process: Problem Solving and Institutional Change in the Developing World* (Macmillan Publishers 1994) 44-46.

<sup>208</sup> Andreasson (n 46).

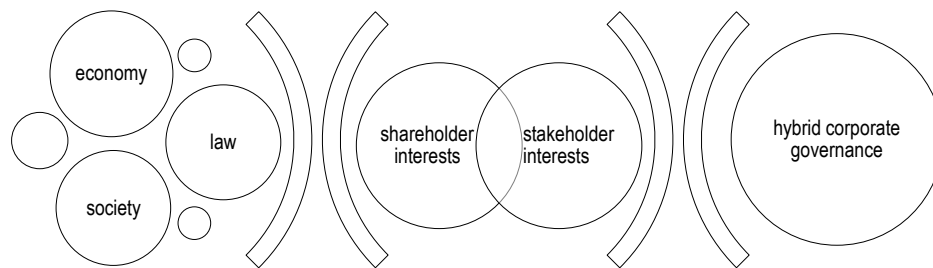
<sup>209</sup> *ibid.*

<sup>210</sup> *ibid.*

<sup>211</sup> A vice-president of the management board of a JSC, interviewed in August 2013.



which the economies of individual countries are linked to each other.<sup>212</sup>



**Figure 7.** Components of hybrid corporate governance according to Andreasson

The definition of cultural framework, ie a mixture of social, legal and economic factors of a country, was then utilised during further stages of this research, eg in order to consider the possibility of implementing the ‘stakeholder inclusivity’ and a one-tier board system in Poland. I also refer to it several times in the subsequent chapters.

The above-mentioned notion of hybrid corporate governance was employed in my research, and, based on it, I chose to analyse issues concerning Polish corporate governance and formulated questions for my interviewees. However, in this regard, I also employed the Aronson<sup>213</sup> definition of hybrid corporate governance.

## 2. Alternative definitions of hybrid corporate governance

According to Aronson<sup>214</sup>, hybrid systems intend ‘to combine the best elements of the board management and monitoring models.’ This is directly associated with the implementation of the one-tier board model of corporate governance in Japan (analysed later in this chapter), which co-exists with the traditional two-tier board system.

I employed the Aronson definition to my research because my further considerations are focused on the possibility of implementing a one-tier board system in Poland and of the implementation of a law that would impose on companies in Poland the obligation to appoint a larger number of independent supervisors and to create board committees. Both solutions were

<sup>212</sup> *ibid.*

<sup>213</sup> Aronson (n 66).

<sup>214</sup> *ibid.*

first introduced into British and American law, and therefore they are an integral part of board management.

Thus, the application of the Aronson approach to hybrid corporate governance to my research findings enabled me to include those issues within this project. In other words, Andreasson's definition, which states that corporate hybridisation is a combination of shareholder and stakeholder concerns, would not enabled me to discuss board issues, as neither the one-tier board model nor the two-tier board model are inseparably integrated with the shareholder and stakeholder approaches to corporate governance. For example, the Polish two-tier board system was based on the shareholder model for almost a century, while the German two-tier board system is commonly considered a stakeholder-based approach to corporate governance<sup>215</sup>.

At this point, I would also like to refer to the document *Best Practices in Asian Corporate Governance*<sup>216</sup>, in which Gonzalez<sup>217</sup> expands on Aronson's and Andreasson's understanding of hybrid corporate governance, declaring that it may combine local and (or) foreign elements ('[c]orporate governance innovations may reflect the shaping forces of local circumstance as much, if not more, than stimulants from abroad'). Accordingly, except for the 'enlightened stakeholder' approach, eg in relation to Philippine corporate governance, and the Japanese reform of the board model, *Best Practices (...)* discusses the issue of the Singaporean disclosure-based system, which is a combination of a voluntarily binding Code of Corporate Governance and a set of mandatory laws, and mandatory training for corporate officials in Malaysia. What these solutions have in common is that neither of them combines (a) the shareholder model of corporate governance with the stakeholder corporate governance model, (b) the best elements of the board management and monitoring models and (c) local and/or foreign elements. Nevertheless, we may assume that Malaysian training reform links the common law system, on which the Malaysian system of law is based, with the civil law system one, of which the main features are that the majority of rules are included with statutes and that non-compliance with them is often sanctioned<sup>218</sup>. On the other hand, the Singaporean government might have combined some foreign solutions concerning disclosure systems with local solutions in this area (see section G in this chapter).

Due to the fact that the above-mentioned issues have a significant impact on the entire model of corporate governance, eg the level of knowledge that board members possess can determine the flow of information between corporate bodies, I decided to include them with my research and this thesis (see chapters IV, V and VI). In particular, I drew significant attention to the

---

<sup>215</sup> Hall & Soskice (n 186).

<sup>216</sup> Asian Productivity Organization, 'Best Practices (...)' (n 50).

<sup>217</sup> Eduardo T. Gonzalez, "'Best Practice' Benchmarking in Asian Corporate Governance: A Review' in *ibid.*

<sup>218</sup> Philip Koh Tong Ngee (n 50); Merryman & Pérez-Perdomo (n 56).

problem of remuneration disclosure in Poland, which is only partially regulated by universally binding law.

Thus, the definition of hybrid corporate governance is neither restricted to the process of combining board elements with each other nor that of combining shareholders' interests with stakeholders' interests. It may simply mean a combination of local and (or) foreign elements, or – in Dolowitz and Marsh's<sup>219</sup> opinion – a combination of objects from different jurisdictions. In any case, Watson<sup>220</sup> reports that most changes in the majority of legal systems take place as an effect of borrowing<sup>221</sup>.

### 3. Legal transplant

The so-called 'legal transplant' indicates the moving of a legal rule or a system of law from one country to another<sup>222</sup>. We may distinguish three approaches to transplant.

According to Berkowitz *et al.*<sup>223</sup>, a transplant is successful '[if it] adopted the law to local conditions, or had a population that was already familiar with basic legal principles of the transplanted law (...). However, if the law was not adapted to local conditions, or if it was imposed via colonization and the population within the transplant was not familiar with the law, [Berkowitz *et al.*<sup>224</sup> claim] that (...) we would expect that initial demand for using these laws to be weak.'

Contrary to this view, for Watson<sup>225</sup>, legal rules are equally at home in many places; 'whatever their historical origins may have been, rules of private law can survive without any close connection to any particular people, any particular period of time or any particular place.'

---

<sup>219</sup> David Dolowitz and David Marsh 'Who Learns What from Whom: a Review of the Policy Transfer Literature' (1996) 44 *Political Studies* 343.

<sup>220</sup> Watson (n 49).

<sup>221</sup> For such authors as, for example, Reed (n 39) countries have recently been focused on adopting solutions from the Anglo-Saxon model of corporate governance (see also Philip Armstrong, Nick Segal and Ben Davies, 'Corporate Governance: South Africa, a pioneer in Africa' (The South African Institute of International Affairs, 2005) <[www.saiia.org.za/images/upload/Corporate\\_Gov\\_3May12005final.pdf](http://www.saiia.org.za/images/upload/Corporate_Gov_3May12005final.pdf)> accessed 13 February 2013), who elaborate on the South African corporate governance in the context of 'global success stories', which they define as the latest achievements of the Anglo-Saxon corporate governance). For Helen Xanthaki ('Legal Transplants in Legislation: Defusing the Trap' (2008) 57 (3) *International and Comparative Law Quarterly* 659), drafting legislation teams have rather turned to countries whose legal system, language and legal tradition is familiar to their own, while developing countries have mainly received legislation offered by foreign donors.

<sup>222</sup> Watson (n 49).

<sup>223</sup> Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163.

<sup>224</sup> *ibid.*

<sup>225</sup> Watson (n 49).

The middle ground on this debate is taken by Jhering<sup>226</sup>, Zweigert and Kötz<sup>227</sup>, who report that the reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. Therefore, the similarity of a legal system with that of the receiving legal order is not that essential for drafting teams as its functionality<sup>228</sup>. As long as the transplant can serve the social need to be addressed, the transplant can work well in the receiving legal order<sup>229</sup>.

In fact, Xanthaki<sup>230</sup> notes that, in the time when they are asked to generate legal acts at record speed, drafting teams often have to search elsewhere for ready solutions with verified results elsewhere, in both similar and different legal systems<sup>231</sup>.

The sections below do not resolve the question of which approach guarantees a successful transplant. South African corporate governance is historically entrenched in the Anglo-Saxon legal tradition, and therefore any solution brought from it to the South African legal system may be effective, despite the approach chosen by the drafting team. In Japan, the implementation of the one-tier board system has not been well surveyed yet. Besides, it probably needs some more time to become rooted in Japanese corporate practice and to start working effectively within the system.

Is it possible to transplant any corporate solution into the Polish corporate governance? I attempt to answer this question in chapter VI, which features my interviews with corporate officials in Poland and their views on this issue.

## 4. The definition of corporate governance

Two definitions of corporate governance were applied to this research, namely the OECD<sup>232</sup> and the

---

<sup>226</sup> Rudolf von Jhering, *Geist des Römischen Rechts*, vol 1 (Breitkopf & Hartel 1955) 8-9.

<sup>227</sup> Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung*, 3. neubearbeitete Auflage (JCB Mohr 1996) 17.

<sup>228</sup> Konrad Zweigert and Kurt Siehr, 'Jhering's Influence on the Development of Comparative Legal Method' (1971) 19 *American Journal of Comparative Law* 215.

<sup>229</sup> Shaohong Zhaung, 'Legal Transplantation in the People's Republic of China: A Response to Alan Watson' [2006] *European Journal of Law Reform* 215.

<sup>230</sup> Xanthaki (n 221).

<sup>231</sup> There is a group of comparatists supporting the opinion that only dissimilarities enrich our understanding of law in a given society (Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11; see also John W.F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Clarendon Press, 1996) 16). As Rudolf B. Schlesinger ('Research on the General Principles of Law Recognised by Civilised Nations' (1957) 51 *American Journal of International Law* 734) declares, 'to compare means to observe and to explain similarities as well as differences'.

<sup>232</sup> OECD, 'OECD Principles of Corporate Governance' (2004) <[www.oecd.org/daf/ca/oecdprinciplesofcorporategovernance.htm](http://www.oecd.org/daf/ca/oecdprinciplesofcorporategovernance.htm)> accessed 28 May 2014.

Cadbury Committee<sup>233</sup> definitions.

The OECD definition is as follows:

‘Corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance.’

This definition was particularly utilised during my study on board models and corporate governance in Poland, as reflected in other chapters (chapter V in particular).

Furthermore, researching the shareholder and stakeholder theories of corporate governance, in particular ‘enlightened shareholder value’ and ‘stakeholder inclusivity’, and some other issues, eg the remuneration policy in particular systems, required a broader view of corporate governance. At this stage, the Cadbury Committee<sup>234</sup> definition was applied, according to which:

‘Corporate governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society.’<sup>235</sup>

Its application is mainly visible in this chapter – in the section on hybrid corporate governance in South Africa and Japan, and in chapter IV, where I discuss enlightened shareholder value in the context of changes that were made in this respect to American and British law.

During my doctrinal research, I came across a statement concerning corporate governance, which – from the perspective of conclusions reached in chapter VII – turned out to be valuable for

---

<sup>233</sup> Adrian Cadbury, ‘Corporate Governance and Development (Global Corporate Governance Forum, Washington 2004) <[www.gcgf.org/wps/wcm/connect/7fc17c0048a7e6dda8b7ef6060ad5911/Focus\\_1\\_Corp\\_Governance\\_and\\_Development.pdf?MOD=AJPERES](http://www.gcgf.org/wps/wcm/connect/7fc17c0048a7e6dda8b7ef6060ad5911/Focus_1_Corp_Governance_and_Development.pdf?MOD=AJPERES)> accessed 23 January 2013.

<sup>234</sup> *ibid.*

<sup>235</sup> In this regard, it is worth drawing attention to Thomas Clarke ((ed), *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (Routledge 2004) 1), according to whom corporate governance is vital to economic and social prosperity: 1) in providing the incentives and performance measures to attain business success, and 2) in providing the accountability and transparency to guarantee the fair distribution of the resulting wealth.

this research. It is the following description of corporate governance:

‘Corporate governance is not only a method firms use to discipline themselves while remaining profitable. It is also one of the principal ways they “make the society” in which they operate and which in turn “makes” them. If this relationship is obscured, it is because the existing policy and regulatory environment confronts firms with an apparently readymade and opaque organization of means and ends, in which compliance is necessary but over whose purpose the majority of organizations, whether companies or civil society groups, have little or no control.’<sup>236</sup>

## C. HYBRID CORPORATE GOVERNANCE IN POLAND

After I had chosen my research topic, I reviewed Polish corporate literature in the context of hybrid corporate governance. This enabled me to create a framework through which I might analyse literature concerning the other legal systems.

In line with previous expectations, my research proved that Polish legal doctrine had not devoted considerable attention to the concept of hybrid corporate governance, which is probably a consequence of the Polish corporate tradition and the overall performance of the Polish economy. The Polish two-tier board model of corporate governance is the only well-known and therefore credible mechanism that Polish business people can use to conduct their affairs<sup>237</sup>. Therefore, there has not been pressure from the business establishment to borrow foreign solutions that would change it significantly and become a topic of discussion in various public forums. In addition, the latest economic crisis did not have as negative an impact on the Polish economy as they had in other countries<sup>238</sup>, for example, in the United States, where they forced the government to carry out deep reforms in the area of corporate law.

There are only three documents that refer to the issue of hybridisation of corporate governance in Poland by installing a new board model. There are also three documents, including court rulings, that deal with enlightened shareholder value in Poland, which should be elaborated in this subsection in view of the latest corporate governance innovations in South Africa.

---

<sup>236</sup> Shigeo Takenaka, ‘Foreword’ in Asian Productivity Organization (n 50).

<sup>237</sup> It was already provided by the first Polish joint-stock regulation of 1928 as well as in its successor, the Commercial Code of 1934, which was ‘revived’ in 1990 after the political and economic turnabout; Arkadiusz Radwan, ‘25 Thoughts on European Company Law in the EU of 25’ (2006) 4 European Business Law Review 1171.

<sup>238</sup> ‘Invest in Poland’ Polish Information and Foreign Investment Agency, “‘The Economist’: Poland Still Positive GDP Growth’ (08.05.2009) <[www.paiz.gov.pl/nawosci/index.php?id\\_news=2102](http://www.paiz.gov.pl/nawosci/index.php?id_news=2102)> accessed 18 March 2014.

The author who first raised the idea of implementation of a one-tier board system in Poland was Sołtysiński<sup>239</sup>. Subsequently, this issue was developed by Oplustil and Radwan<sup>240</sup> in *Private Law in Eastern Europe: Autonomous Development or Legal Transplants?*, in which they recall that the Codification Commission discussed the possibility of installing this system in Poland while working on the currently binding Company Code of 2000<sup>241</sup>. There was a proposal prepared granting shareholders the possibility to opt for an optimum model (be it one-tier or two-tier) to fit particular needs of a given company. However, in the end the Commission decided to preserve the traditional model of corporate governance. For Kozarzewski<sup>242</sup>, who briefly refers to the Commission's choice, the resistance to the new solution stemmed mainly from the weak economic performance of Poland in the early 1990s.

Another essential piece of work that is worth mentioning here is the Code of Best Practices of 2002<sup>243</sup>. Under this Code, at least half of supervisory board members must be independent. This far-reaching rule was not compatible with the main feature of the Polish corporate governance system, characterised by the dominance of consolidated ownership where controlling shareholders exercise their power via the supervisory board. Therefore an overwhelming majority of Polish companies refused to accept that rule.<sup>244</sup> Oplustil and Radwan<sup>245</sup> report that this '(...) attempt to transplant the Anglo-Saxon concept of independent directors into the Polish was a partial failure.'

The Code of Best Practices of 2002 has been replaced by a new version several times – in 2005, 2007 and 2010. None of these new codes was as liberal in the approach to the issue of independent supervisors as Code of 2002 (for further explanation see section 'The Independence of Supervisors' in chapter V).

Enlightened shareholder value has not also brought a considerable change to corporate governance in Poland, but can be considered hybrid, if we take into account that it involves a combination of elements from different jurisdictions (see section B in this chapter).

Corporate governance literature reports that 'the interests of stakeholders should be respected in so far as they are covered by protective legal provisions (eg labour law, insolvency law, consumer law, banking law) and any extension of legal protection stemming from corporate law is generally allowed only if it can be aligned with the interests of shareholders as a group'<sup>246</sup>.

Nevertheless, exceptional case-law extends the notion of company interest to

---

<sup>239</sup> Sołtysiński (n 10).

<sup>240</sup> Oplustil & Radwan (n 7).

<sup>241</sup> *ibid*; Sołtysiński (n 10).

<sup>242</sup> Kozarzewski (n 14).

<sup>243</sup> The full text is available on <[www.corp-gov.pgw.pl](http://www.corp-gov.pgw.pl)> accessed 2 March 2014.

<sup>244</sup> Oplustil & Radwan (n 7) 490.

<sup>245</sup> *ibid*.

<sup>246</sup> *ibid*.

accommodate other stakeholders' perspectives. For example, the Appeal Court judgment in Łódź (7 March 1994)<sup>247</sup> provides that bank account holders might be perceived as stakeholders whose interests contribute to the interpretation of the company's interest as a whole<sup>248, 249</sup>.

It should also be remembered that Polish law provides for a certain degree of workers' co-determination (see chapters V – 'Corporate Governance in Poland' – 'The Supervisory Board' and VI 'Analysis of Interviews' – 'Employees and Bank Representatives on Supervisory Boards in Poland'). Thus, employees' ability to influence the determination of the company's interests through their representatives in the company's management organs is limited.

Such understanding of the company interest can be described as enlightened shareholder value (for further explanation of its meaning see section D – subsection 1 in this chapter and section 'Shareholder Value' in chapter IV). This was reflected in the Code of Best Practices of 2005<sup>250</sup>, according to which:

'[t]he main objective of a company's authorities is to further the company's interests, i.e. to increase the value of the assets entrusted to them by the shareholders, taking into consideration the rights and interests of entities other than the shareholders that are involved in the functioning of the company, especially the company's creditors and employees.'

In addition, a specific rule contained in the section pertaining to the board's duties recapitulated the overlying role of company's interest by stating that the management board, when establishing the interest of the company, should keep in mind the long term interests of the shareholders, creditors, employees and other entities and persons cooperating with the company, as well as the interests of local community<sup>251</sup>. The Code of Best Practices of 2007 repealed this broad definition of the company interest, leaving the determination of company interest up to the managers, commentators and ultimately to the courts.

The issue of enlightened shareholder value is developed in section 'Enlightened Shareholder Value in Poland' in chapter VI, as well as the issue of supervisors' independence – in

---

<sup>247</sup> ACr 21/94, published in Wokanda 1994, No. 11, p. 54.

<sup>248</sup> This decision, regarding a capital increase for a bank, justified the exclusion of existing shareholders (pre-emption right) to streamline the capital supply and strengthen the financial condition of the bank, which would in turn benefit the interests of bank account holders (depositors).

<sup>249</sup> See Józef Okolski, Jerzy Modrzejewski and Łukasz Gasiński, 'Natura stosunku korporacyjnego spółki akcyjnej' (2000) 8 Przegląd Prawa Handlowego 11; Józef Okolski, Jerzy Modrzejewski and Łukasz Gasiński, 'Zasada równego traktowania akcjonariuszy na gruncie k.s.h.' (2002) 10 Przegląd Prawa Handlowego 24; Arkadiusz Radwan, *Prawo poboru w spółce Akcyjnej* (C.H. Beck 2004) 275.

<sup>250</sup> General Rules, rule no. 1. The Code of Best Practices of 2005 is available on <[www.corp-gov.gpw.pl/publications.asp?jezyk=angielski](http://www.corp-gov.gpw.pl/publications.asp?jezyk=angielski)> accessed 5 May 2014.

<sup>251</sup> Point 33.



## D. HYBRID CORPORATE GOVERNANCE IN SOUTH AFRICA

### 1. The 'stakeholder inclusive' model

The hybridisation of South African corporate governance was the next topic of my literature review. In the South African system, the concept of enlightened shareholder value was developed and turned into the so-called 'stakeholder inclusivity'.

King<sup>252</sup> explains the stakeholder inclusive approach as follows:

'It is recognised that in what is referred to as the 'enlightened shareholder' model as well as the 'stakeholder inclusive' model of corporate governance, the board of directors should also consider the legitimate interests and expectations of stakeholders other than shareholders. The way in which the legitimate interests and expectations of stakeholders are being treated in the two approaches is, however, very different. In the 'enlightened shareholder' approach the legitimate interests and expectations of stakeholders only have an instrumental value. Stakeholders are only considered in as far as it would be in the interests of shareholders to do so. In the case of the 'stakeholder inclusive' approach, the board of directors considers the legitimate interests and expectations of stakeholders on the basis that this is in the best interests of the company, and not merely as an instrument to serve the interests of the shareholder.'

The integration and compromise between various stakeholders are made on a case-by-case basis, to serve the best interests of the company. For King<sup>253</sup> '[t]he best interests of the company should be interpreted within the parameters of the company as a sustainable enterprise and the company as a responsible corporate citizen.'

The ethical foundation for corporate citizenship is the African value system of *Ubuntu* (for further explanation see subsection B in this chapter), which – in the corporate context – means that decision-makers should take into account that nature, society, and business are interrelated in compound ways<sup>254</sup>. Therefore, companies '(...) [are] considered as much a citizen of a country as is

---

<sup>252</sup> King (n 34); see also Estelle de Beer and Ronel S. Rensburg, 'Towards a Theoretical Framework for the Governing Stakeholder Relationships: A Perspective from South Africa' (2011) 11 *Journal of Public Affairs* 208.

<sup>253</sup> King, *ibid.*

<sup>254</sup> Albert Luthuli Centre, 'Interview Summary Report (...)' (n 203).

a natural person who has citizenship'<sup>255</sup>. They are vital to society.

Stakeholder inclusivity creates certain challenges. Andersen<sup>256</sup> points out two: identifying exactly who the stakeholders are, and developing policy on how they should be engaged, and how the company reports back to them. According to Wilkinson<sup>257</sup>, a reflection of this can be seen in the increasing number of boards who are changing their mindsets and taking stakeholder issues into consideration.

Godsell<sup>258</sup> raises the following critique against stakeholder inclusive value. Africans have not reflected on how complicated stakeholder capitalism can be. The stakeholder model is entirely different from the shareholder approach to corporate governance, which is typical for market-based societies like the US, Europe and Asia. In this regard, Godsell<sup>259</sup> explains that the stakeholder model is complex because it involves different boards with different capacities and different behaviours.

On the other hand, Adam<sup>260</sup> wonders whether stakeholder inclusivity does not in reality stand for the same as the enlightened shareholder concept. For him, there is also not much cohesion between the principle and the remaining content of King III:

‘The shareholder-enlightened model says that you engage and build relationships with stakeholders. As long as it adds value, then that’s the good thing to do. But in the same vein, does it mean that you don’t do it anymore when stakeholder inclusivity stops adding value? The stakeholder model says you engage with stakeholders because it is in the best interests of the company to do so. Establishing strong stakeholder relations will hold you in good stead as a company. The stakeholder model doesn’t give the shareholder *de facto* precedence in that debate. On a case by case analysis you say: ‘how do I take into account what all the stakeholders’ legitimate expectations are and, based on this decision today, I think we do it this way’. We have statements like that in King, but if you look through [the Report] it’s not obvious that this is the model being followed. In terms of an aspirational code and pushing for agreement, we’ve said something I don’t even think the King Committee themselves have

---

<sup>255</sup> *ibid*; see also United Nations, ‘Global Compact and the Principles for Responsible Investment’ <[www.unpri.org/introducing-responsible-investment/](http://www.unpri.org/introducing-responsible-investment/)> accessed 21 July 2013; European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (Brussels 2011) <[www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF](http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF)> accessed 26 July 2013; see also <[www.ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index\\_en.htm](http://www.ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm)> accessed 26 July 2013; OECD, ‘Guidelines for Multinational Companies’ <[www.oecd.org/daf/inv/mne/](http://www.oecd.org/daf/inv/mne/)> accessed 5 August 2013.

<sup>256</sup> R. Andersen in Albert Luthuli Centre, ‘Interview Summary Report (...)’ (n 203).

<sup>257</sup> Richard Wilkinson in *ibid*.

<sup>258</sup> R. M. Godsell in *ibid*.

<sup>259</sup> *ibid*.

<sup>260</sup> M. Adam in *ibid*.

internalised.<sup>261</sup>

In Tullberg's<sup>262</sup> opinion, the stakeholder's theory of the notion of a stakeholder includes too many subjects into the notion of a stakeholder. Clarkson<sup>263</sup> expresses this point concisely: 'Stakeholder theory should not be used to weave a basket big enough to hold the world's misery.' The theory should probably be brought more in line with the ambitions of the 'enlightened stakeholder' theory<sup>264</sup>.

## 2. The 'apply or explain' principle

Another significant change to corporate governance in South Africa, which was a part of the hybridisation process, was the application of the so-called 'apply or explain' principle in the King Code of Governance for South Africa 2009 (King III).

Generally speaking, the governance of companies can be on a statutory basis, as a code of principles and practices, or a combination of the two. The statutory regime is known as the 'comply or else' approach. This means that there are sanctions for non-compliance.<sup>265</sup>

There is an important argument against the 'comply and else' regime. For Schulshenk<sup>266</sup>, a 'one size fits all' approach is not suitable because the types of business carried out by companies vary to a large degree. For King<sup>267</sup>, the jeopardy is that the board and management might become absorbed in compliance at the expense of enterprise: 'It is the duty of the board of a trading enterprise to undertake a measure of risk for reward and to try to improve the economic value of a company. If the board has a focus on compliance, the attention on its ultimate responsibility, namely performance, may be diluted.' At this point, King<sup>268</sup> mentions the American case of complying with SOX. He argues that the total cost to the American economy of complying with this document amounts to more than the total write-off Enron, World Com and Tyco combined.

56 countries of the Commonwealth, including South Africa, and the 27 states of the EU, including the United Kingdom, '(...) opted for a code of practices and principles on a 'comply or explain' basis, in addition to certain governance issues that are legislated'<sup>269</sup>. The issue of whether

---

<sup>261</sup> *ibid.*

<sup>262</sup> Jan Tullberg, 'Stakeholder theory: Some revisionist suggestions' (2013) 42 *The Journal of Socio-Economics* 127.

<sup>263</sup> Max Clarkson in Robert Philips, *Stakeholder Theory and Organizational Ethics* (Berrett-Koehler Publishers 2003) 119.

<sup>264</sup> Albert Luthuli Centre, 'Interview Summary Report (...)' (n 203).

<sup>265</sup> King (34).

<sup>266</sup> Jess Schulshenk in Albert Luthuli Centre, 'Interview Summary Report (...)' (n 203).

<sup>267</sup> King (n 34).

<sup>268</sup> *ibid.*

<sup>269</sup> *ibid.*

the United Nations Governance Code should be 'comply or explain' or 'comply or else' was hotly discussed at the United Nations<sup>270</sup>.

In theory, the 'comply or explain' mechanism provides both flexibility in the application of the code and a means by which to evaluate compliance:

'While it is expected that listed companies will comply with the Code's provisions most of the time, it is recognized that departure from the provisions of the code may be justified in particular circumstances. Every company must review each provision carefully and give a considered explanation if it departs from the Code provisions.'<sup>271</sup>

However, surveys of compliance with codes of corporate governance<sup>272</sup> and the way in which companies make use of the option to 'explain', prove that the mechanism is not as efficient as it is expected to be<sup>273</sup>. Seidl *et al.*<sup>274</sup> reports that just 51% of the 30 largest companies in the UK, and 40% of the 30 largest companies in Germany entirely followed the code.

At the United Nations, it was eventually decided that the UN codes should operate on an 'adopt or explain' basis. The representatives of several of the world bodies had opposed the use of the word 'comply', 'because it connoted that there had to be adherence and there was no room for flexibility.'<sup>275</sup>

In the Netherlands, the board can now decide to apply recommendations differently or apply another practice and still achieve the objective of the overarching corporate governance principles ('apply or explain'). This gives far greater flexibility to companies in terms of governance compliance.<sup>276</sup>

In South Africa, King III finally introduced the 'apply or explain' approach. This opens a door for a vastly wider scope of interpretation and application compared to inflexible legislation<sup>277</sup>.

---

<sup>270</sup> *ibid.*

<sup>271</sup> Financial Reporting Council, 'The Combined Code on Corporate Governance' (June 2008) <[www.frc.org.uk/getattachment/1a875db9-b06e-4453-8f65-358809084331/The-Combined-Code-on-Corporate-Governance.aspx](http://www.frc.org.uk/getattachment/1a875db9-b06e-4453-8f65-358809084331/The-Combined-Code-on-Corporate-Governance.aspx)> accessed 27 March 2014.

<sup>272</sup> Arcot, Bruno & Faure-Grimaud (n 31); see also Sridhar Arcot and Valentina Bruno, 'In letter not in spirit: An analysis of Corporate Governance in the UK', London School of Economics, Working Paper No. 031, 2006; Iain MacNeil and Xiao Li, 'Comply or Explain: Market Discipline and Non-compliance with the Combined Code' (2006) 14 *Corporate Governance: An International Review* 486.

<sup>273</sup> *ibid.*

<sup>274</sup> David Seidl, Paul Sanderson and John Roberts, 'Applying 'Comply-or-Explain': Conformance with Codes of Corporate Governance in the UK and Germany', Centre for Business Research, University of Cambridge, Working Paper No. 389, 2009 <[www.cbr.cam.ac.uk/pdf/WP389.pdf](http://www.cbr.cam.ac.uk/pdf/WP389.pdf)> accessed 23 June 2013.

<sup>275</sup> *ibid.*

<sup>276</sup> See International Chamber of Commerce <[www.iccwbo.org](http://www.iccwbo.org)> accessed 29 June 2013.

<sup>277</sup> Albert Luthuli Centre, 'Interview Summary Report (...)' (n 203).

King<sup>278</sup> reports that this is in keeping with international norms. Citing the Netherlands as an example, he states the following: '[t]his is a practice adopted by most trade departments internationally.' King<sup>279</sup> notes that the UK is in the process of reassessing the 'apply or explain' model, about which he says: 'Perhaps they missed a trick'.

Other observers note that such an approach is both empowering – and potentially dangerous<sup>280</sup>.

According to Bourne<sup>281</sup>, the 'apply or explain' approach is one of the biggest challenges contained in King III: 'Corporate SA does not have an environment yet where stakeholders are vigilant or challenging. If a company does not apply the code, it will be interesting to see if stakeholders will take on the challenge.' Botha<sup>282</sup> declares that the 'apply and explain' approach forms a loophole for companies to evade liability. Adam<sup>283</sup> further maintains that transparency should keep companies liable to both their shareholders and the stakeholders. In his opinion, the lost component is participation by both shareholders and stakeholders alike, who can hold companies to account on their decisions. Schulshenk<sup>284</sup> summarises the dispute as follows: '(...) good behaviour will always exist without the codification of principles, but they serve as an important safety net against bad behaviour.' In Schulshenk's point of view, the right blend of principles and legislation is essential to be able to impose on companies, where necessary, minimum standards of satisfactory behaviour<sup>285</sup>.

Certain principles and recommended practices have been legislated and companies must conform to the letter of law. Also, what was included within the common law is being reiterated in statutes.<sup>286</sup> In this regard, the most important change is probably the incorporation of the common law duties of directors in the South African Companies Act 2008<sup>287</sup>.

---

<sup>278</sup> Mervyn E King in Sanchia Temkin, 'King Calls for More Transparency' (Mervyn E King SC, 2 September 2009) <[www.mervynking.co.za/news/archives/09\\_09\\_king3\\_bd.htm](http://www.mervynking.co.za/news/archives/09_09_king3_bd.htm)> accessed 17 July 2013.

<sup>279</sup> *ibid.*

<sup>280</sup> Albert Luthuli Centre, 'Interview Summary Report (...)' (n 203).

<sup>281</sup> Mike Bourne in Temkin (n 278).

<sup>282</sup> T. Botha in Albert Luthuli Centre, 'Interview Summary Report (...)' (n 203).

<sup>283</sup> M. Adam in *ibid.*

<sup>284</sup> Jess Schulshenk in *ibid.*

<sup>285</sup> *ibid.*

<sup>286</sup> *ibid.*

<sup>287</sup> *ibid.*

### 3. Boardroom according to King III

There are some other boardroom changes in South Africa, included with King III, which are in line with the latest international trends in this area. They might not be perceived as hybrid by the South African legal doctrine, as they come directly from British corporate governance, upon which the South African system is based. Therefore, here, there is no combination of elements from different jurisdictions, which is the essence of the definition of hybrid corporate governance (see section B in this chapter). However, if implemented in Poland, these changes might be considered hybrid, eg an increase in the number of independent supervisors, which for Oplustil and Radwan<sup>288</sup> is an '(...) attempt to transplant the Anglo-Saxon concept of independent directors (...)’.

PricewaterhouseCoopers (PwC)<sup>289</sup> lists the following boardroom changes in South Africa:

- every board should elect a chairman of the board, who is an independent non-executive director, and a CEO, and create an outline for the delegation of authority;
- the roles of CEO and chairman should be separated;
- the board should maintain a balance of power, with a majority of non-executive directors;
- the majority of non-executive directors should be independent.

In particular, the latter has already had an impact on the functioning of South African corporate governance. According to Armstrong *et al.*<sup>290</sup>, including independent directors on the board has raised the need for a more effective induction programme for directors, and strategies for their further development. The Institute of Directors has mainly earned a great reputation in establishing training programmes for directors, whether inexperienced or experienced<sup>291</sup>.

Other innovations in the South African boardroom have also turned out to work effectively within the system. For example, the condition that directors and boards have to be evaluated regularly ensures that companies in both the private and public sectors stay competitive, with all directors very clear about their duties and obligations. This also allows the more sophisticated aspects of board governance to come into play.<sup>292</sup> Andersen<sup>293</sup> highlights how, in his international experience, South African boards can spend up to 40% more time on issues of corporate

---

<sup>288</sup> Oplustil & Radwan (n 7) 490.

<sup>289</sup> PricewaterhouseCoopers Southern Africa, 'King's Counsel. Understanding and Unlocking the Benefits of Sound Corporate Governance' (September 2009) <[www.c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/dd8b591e-3d00-48d5-b2e9663fedcff131/Executive\\_guide\\_to\\_King\\_III.pdf?hhSearchTerms=%22King+and+III+and+Counsel+and+Guide%22](http://www.c.ymcdn.com/sites/www.iodsa.co.za/resource/collection/dd8b591e-3d00-48d5-b2e9663fedcff131/Executive_guide_to_King_III.pdf?hhSearchTerms=%22King+and+III+and+Counsel+and+Guide%22)> accessed 23 May 2014.

<sup>290</sup> Armstrong, Segal & Davies (n 221).

<sup>291</sup> *ibid.*

<sup>292</sup> PwC, 'King's Counsel (...)' (n 289).

<sup>293</sup> R. Andersen in Albert Luthuli Centre, 'Interview Summary Report (...)' (n 203).

governance than other boards: 'Whilst much of the boards' time may be spent on the issue of compliance, there has been a broader shift in the understanding of their role.'

There has been an apparent move away from the primarily 'big boss' model to a more 'consultative board dynamic'<sup>294</sup>. Börzel<sup>295</sup> reports that the move is partially driven by the new Companies Act of 2008 and amplified liabilities, although concerns remain about the inactivity of some non-executive directors. In this respect, Andersen<sup>296</sup> notes some positive occurrences:

'Directors are far more prepared. They seek more information. The non-executive directors are playing a far more active role, probably because they realise they are carrying far more responsibility and risk. It wasn't unusual in the early days for there to be three or four so-called 'heavyweight directors'. I used to call them the 'grumpy old men' and they would call the shots, while the rest would nod wisely. But it doesn't happen like that anymore. Boards are there for everyone to contribute.'

In line with the Albert Luthuli Centre for Responsible Leadership<sup>297</sup>, over the last two decades, South Africa has without a doubt evolved from low levels of governance awareness to a point where today it is constantly ranked as a leader in global competitiveness surveys for its good corporate governance practices. The Centre<sup>298</sup> notes that the perception of corruption<sup>299</sup> has started to tarnish this image in recent years, but on the whole the country has certainly profited from high standards of corporate governance.

## **E. HYBRID CORPORATE GOVERNANCE IN JAPAN**

### **1. The new approach to shareholders**

Japanese corporate governance has also undergone a deep reform over the last decade, which has placed it in the new category of hybridised corporate governance. It is a very interesting case

---

<sup>294</sup> *ibid*; see also Tanja A. Börzel and Christian Thauer (eds), *Business and Governance in South Africa: Racing to the Top?* (Palgrave Macmillan 2013) 9.

<sup>295</sup> Börzel and Thauer, *ibid*.

<sup>296</sup> R. Andersen in Albert Luthuli Centre, 'Interview Summary Report (...)' (n 203).

<sup>297</sup> Albert Luthuli Centre, 'Interview Summary Report (...)', *ibid*.

<sup>298</sup> *ibid*.

<sup>299</sup> Lynn McGregor, 'Improving Corporate Governance in South Africa. Discussion Paper Submitted for the 1<sup>st</sup> USB Colloquium on Corporate Governance 18<sup>th</sup> September 2008' <[www.governance.usb.ac.za/pdfs/UnitColloquiumPaper1\\_LynnMcGregor.pdf](http://www.governance.usb.ac.za/pdfs/UnitColloquiumPaper1_LynnMcGregor.pdf)> accessed 19 February 2013.

of implementing foreign corporate solutions from the common law system into the civil law corporate ground. It began from a radical change in the approach to the concept of shareholding in a company in Japan.

Before the 1990s corporate governance in Japan did not receive much attention from a public policy or managerial perspective. The government adopted the stakeholder model of corporate governance, in which shareholders are simply treated as one of the stakeholders and their interests are not given precedence<sup>300</sup>. The stakeholder model is often called *keiretsu*, and is based on the Japanese industrial system that has been characterised by its tight network of suppliers, buyers, and financial institutions<sup>301</sup>. In particular, the long-term affiliation between a debtor company and the main creditor bank draws attention<sup>302</sup>:

‘A main bank relationship is conventionally defined as a long-term relationship between a debtor firm and a main creditor bank. That is, the firm borrows the largest part of its loans from this bank. The main bank relationship is not characterized by bank loans alone, however. Main banks often hold shares in their client firms and take care of the firms’ cash management accounts. Further, market participants and government regulators perceive the role of the main bank as keeping an eye on its client firms and even intervening in the management of these firms if required.’<sup>303</sup>

Another unusual occurrence in Japan’s corporate governance are the so-called ‘stable shareholders’. Stable investors own their shares largely to reinforce and grow stable business relationships rather than to earn on their share investments<sup>304</sup>. They also own shares to guarantee stability in profits and sales so that they can protect the interests of important stakeholders including employees, management, business partners such as banks, suppliers, and other affiliated

---

<sup>300</sup> Yoshikawa (n 62).

<sup>301</sup> *ibid*; see also, for example, Hideaki Miyajima, Masahiko Aoki and Gregory Jackson, *Corporate Governance in Japan: Institutional Change and Organizational Diversity* (Oxford University Press 2008) 8.

<sup>302</sup> Yoshikawa (n 62).

<sup>303</sup> See also Masahiko Aoki, Hugh Patrick and Paul Sheard, ‘The Japanese Main Bank System: An Introductory Overview’ in Masahiko Aoki and Hugh Patrick (eds), *The Japanese Main Bank System: Its Relevance for Developing and Transforming Economics* (Oxford University Press 1994) 3-50; Steven N. Kaplan, ‘Top Executive Rewards and Firm Performance: A Comparison of Japan and the United States’ (1994) 102 *Journal of Political Economy* 29; Paul Sheard, Steven N. Kaplan and Bernadette A. Minton, ‘Appointments of Outsiders to Japanese Boards: Determinants and Implications for Managers’ 36 (1994) *Journal of Financial Economics* 510; Jun-Koo Kang and Anil Shivdasani, ‘Firm Performance, Corporate Governance, and Top Executive Turnover in Japan’ (1995) 11 *Journal of Financial Economics* 5; ‘The Main Bank System and Corporate Monitoring and Control in Japan’ (1989) 11 *Journal of Economic Behaviour and Organization* 399; Michael L. Gerlach, *Alliance Capitalism: The Social Organization of Japanese Business* (University of California Press 1992) 27.

<sup>304</sup> Jonathan Charkham, *Keeping Good Company: A Study of Corporate Governance in Five Countries* (Clarendon Press 1994) 29; see also W. Carl Kester, *Japanese Takeovers: The Global Contest for Corporate Control* (Harvard Business School Press 1991) 38



companies<sup>305</sup>.

A survey<sup>306</sup> reports that before 1990 as high as 70 to 75% of shares owned in Japan belonged to the stable investors category, defined as long-term, *keiretsu*- or business-affiliated holders of shares. As a consequence, managers of Japanese companies did not draw much attention to the concerns of financial investors who bought, sold, and held shares purely for financial purposes. As Yoshikawa<sup>307</sup> says, 'since these stable investors do not aim at maximizing the investment return on their shareholding, they do not impose much pressure on managers to improve firm performance.'

Investors in Japan had enjoyed higher profits from their share investments than they would have received from other investment alternatives due to the great performance of the Japanese economy which pushed up the stock markets. Survey<sup>308</sup> results have shown that investors in Japanese stock markets gained a nominal return of 17.9% or a real return of 11.7% during the period between 1962 and 1986. Thus, there was no strong motivation for those investors to pay much attention to how Japanese firms were governed.

In the 1990s the situation began to change. Globalisation of share investment by institutional investors, especially from the US and Europe, led foreign investors to a buying spree of Japanese shares (see Table 1 below). In particular, relatively cheaper Japanese equity prices after the collapse of the bubble economy encouraged them to invest in Japan.<sup>309</sup>

In spite of the fact that domestic shareholders are still powerful in Japanese companies, the firm growth of foreign ownership is one of the most noticeable changes in ownership structure since the 1990s. Importantly, data from 2003 show that foreign investment in Japan tends to be dominated by institutional investors from the US and the UK. They own 41.8% and 30.9% of total foreign shares respectively.<sup>310</sup>

Each foreign investor usually holds only a small number of shares. However, they tend to trade more often than domestic shareholders<sup>311</sup>. Foreign investors are those who buy, sell, and hold shares mostly for investment purposes, as opposed to business relationship purposes:

'The main investment objective of foreign investors is a high investment return because, unlike stable domestic investors, they only have arm's-length relations with companies in

---

<sup>305</sup> Richard E. Caves and Masu Uekusa, *Industrial Organization in Japan* (Brookings Institution 1976) 18; see also Iwao Nakatani, 'The Economic Role of Financial Corporate Grouping' in Masahiko Aoki, *The Economic Analysis of the Japanese Firm* (North-Holland 1984) 227.

<sup>306</sup> Yoshikawa (n 62).

<sup>307</sup> *ibid.*

<sup>308</sup> *ibid.*

<sup>309</sup> Keisuke Nitta, 'Cross Shareholdings and Business Management: An Empirical Analysis' (2000) 38 *Security Analysts Journal* 72.

<sup>310</sup> *ibid.*

<sup>311</sup> *ibid.*

which they own shares. This means that they are under no constraint, unlike domestic stable investors, to reduce their expectations for maximization of investment return in order to maintain business relationships with companies in which they hold shares.<sup>312</sup>

**Table 1.** Shareholder ownership in Japan<sup>313</sup>

**[Table 3] Distribution Percent of Market Value Owned by Type of Shareholder** (Units: %)

Survey Year	Govt. & Local Govt.	Financial Institutions	City & Regional Banks	Trust Banks	Investment Trusts	Annuity Trusts	Life Insurance Cos.	Non-life Insurance Cos.	Other Fin. Institutions	Securities Companies	Business Corps.	Foreigners	Individuals
1970	0.6	31.6	15.8	—	2.1	—	10.0	3.7	2.1	1.3	23.9	4.9	37.7
1975	0.4	35.5	19.0	—	2.2	—	10.2	4.4	2.0	1.4	27.0	3.6	32.1
1980	0.4	38.2	19.9	—	1.9	0.4	11.5	4.6	2.3	1.5	26.2	5.8	27.9
1985	0.3	39.8	20.9	—	1.7	0.8	12.3	4.1	2.4	1.9	28.8	7.0	22.3
1986	0.9	41.5	14.9	7.3	1.9	1.0	12.8	4.0	2.5	2.1	30.1	5.3	20.1
1987	0.5	42.5	14.9	8.6	2.6	1.1	12.4	4.0	2.6	2.3	30.3	4.1	20.4
1988	0.4	44.1	15.7	9.8	3.1	1.0	12.6	4.1	2.0	2.3	29.0	4.3	19.9
1989	0.3	43.5	15.7	10.2	3.7	0.9	11.8	3.9	1.9	2.0	29.5	4.2	20.5
1990	0.3	43.0	15.7	9.8	3.7	0.9	12.0	3.9	1.6	1.7	30.1	4.7	20.4
1991	0.3	42.8	15.6	9.7	3.4	1.0	12.2	3.9	1.4	1.5	29.0	6.0	20.3
1992	0.3	42.9	15.6	9.9	3.2	1.2	12.4	3.8	1.2	1.2	28.5	6.3	20.7
1993	0.3	42.3	15.4	10.0	2.9	1.4	12.1	3.7	1.1	1.3	28.3	7.7	20.0
1994	0.3	42.8	15.4	10.6	2.6	1.6	12.0	3.7	1.1	1.2	27.7	8.1	19.9
1995	0.3	41.1	15.1	10.3	2.2	1.8	11.1	3.6	1.0	1.4	27.2	10.5	19.5
1996	0.2	41.9	15.1	11.2	2.0	2.4	11.1	3.6	0.9	1.0	25.6	11.9	19.4
1997	0.2	42.1	14.8	12.4	1.6	3.8	10.6	3.5	0.9	0.7	24.6	13.4	19.0
1998	0.2	41.0	13.7	13.5	1.4	4.7	9.9	3.2	0.8	0.6	25.2	14.1	18.9
1999	0.1	36.5	11.3	13.6	2.2	5.0	8.1	2.6	0.9	0.8	26.0	18.6	18.0
2000	0.2	39.1	10.1	17.4	2.8	5.5	8.2	2.7	0.7	0.7	21.8	18.8	19.4
2001	0.2	39.4	8.7	19.9	3.3	6.0	7.5	2.7	0.7	0.7	21.8	18.3	19.7
2002	0.2	39.1	7.7	21.4	4.0	5.8	6.7	2.6	0.7	0.9	21.5	17.7	20.6
2003	0.2	34.5	5.9	19.6	3.7	4.5	5.7	2.4	0.9	1.2	21.8	21.8	20.5
2004	0.2	32.0	5.2	18.4	3.8	3.9	5.2	2.2	1.0	1.2	22.1	23.3	21.3
2005	0.2	30.9	4.7	18.0	4.3	3.5	5.1	2.1	1.0	1.4	21.3	26.3	19.9
2006	0.3	30.7	4.6	17.6	4.6	3.5	5.3	2.2	1.0	1.8	20.8	27.8	18.7
2007	0.4	30.5	4.7	17.3	4.8	3.5	5.4	2.2	0.9	1.5	21.4	27.4	18.7
2008	0.4	32.0	4.8	18.8	5.0	3.5	5.3	2.1	0.9	1.0	22.6	23.5	20.5
2009	0.3	30.6	4.3	18.4	4.7	3.4	5.0	2.0	0.9	1.6	21.3	26.0	20.1
2010	0.3	29.7	4.1	18.2	4.4	3.2	4.5	1.9	1.0	1.8	21.2	26.7	20.3
2011	0.3	29.4	3.9	18.6	4.5	3.0	4.3	1.8	0.8	2.0	21.6	26.3	20.4
2012	0.2	28.0	3.8	17.7	4.5	2.5	4.1	1.6	0.8	2.0	21.7	28.0	20.2
High (Year)	0.9(1986)	44.1(1988)	20.9(1985)	21.4(2002)	5.0(2008)	6.0(2001)	12.8(1986)	4.8(1979)	2.6(1987)	2.3(1988)	30.3(1987)	28.0(2012)	37.7(1970)
Low (Year)	0.1(1999)	28.0(2012)	3.8(2012)	7.3(1986)	1.4(1998)	0.4(1982)	4.1(2012)	1.6(2012)	0.7(2001)	0.6(1998)	20.8(2006)	2.7(1978)	18.0(1999)

(Note) The number of Trust Banks are included in that of City & Regional Banks in and before 1985 Survey.

Since the 1990s, there has been a significant deterioration in steady ownership and cross-shareholdings among affiliated companies and banks in Japan.

Nitta<sup>314</sup> surveyed the effect of foreign ownership on company performance for the period between 1988 and 1997, and found that foreign ownership was positively associated with stock index, return on assets, return on equity, and earnings. Yoshikawa and Phan<sup>315</sup> obtained the same result with respect to foreign ownership between 1997 and 1999. Yet, a study by Gedajlovic *et al.*<sup>316</sup> did not find any relationship between foreign ownership and return on assets during the period between 1996 and 1998. Interestingly, a survey conducted by the Ministry of Finance and the Tokyo Stock Exchange (TSE)<sup>317</sup> shows that companies with large foreign ownership had higher return on

<sup>312</sup> *ibid.*

<sup>313</sup> Copied from Aronson (n 66).

<sup>314</sup> Nitta (n 309).

<sup>315</sup> Toru Yoshikawa and Phillip H. Phan, 'The Performance Implications of Ownership-Driven Governance Reform' (2003) 6 *European Management Journal* 698.

<sup>316</sup> Eric T. Gedajlovic, Toru Yoshikawa and Motomi Hashimoto, 'Ownership Structure, Investment Behavior and Firm Performance in Japanese Manufacturing Industries' (2005) 26 *Organization Studies* 7.

<sup>317</sup> Yoshikawa (n 62).

equity.

## 2. Boardroom reforms

The change in the ownership structure led to significant changes in corporate governance practices.

Investors who were no longer interested in preserving stable relationships with companies began to put pressure on companies to concentrate on growth and market share in order to achieve higher productivity and returns<sup>318</sup>. The extensive call to recover the efficiency of board monitoring became particularly strong after the 1997 Asian economic crisis, which exposed the weaknesses of corporate governance in Asian countries<sup>319</sup>.

Moreover, diminishing profits and growing public demand from such interest groups as home pension funds and the Japan Corporate Governance Forum stressed the necessity for Japanese boards to have a more active monitoring role in management<sup>320</sup>.

This all required Japanese companies to change their strategy regarding interest dissemination among the shareholders<sup>321</sup>.

In 1993, the Commercial Code introduced what became known as the *kansayaku* system, which required a company to establish a board with a minimum of three statutory auditors (*kansayaku*), including one outside auditor<sup>322</sup>. In addition, shareholders' rights were also increased by:

- the reduction of the minimum percentage of shares (from 10 to 3%) owned by those with the authority to demand an inspection of accounting records; and
- reducing the legal fee for shareholder class-action lawsuits to ¥8200<sup>323, 324</sup>.

Up to this point, management was monitored by the 'main bank system' in which a company's bank was typically both its main shareholder and principal lender<sup>325</sup>.

The Commercial Code was reviewed in 2001 with the goal of improving corporate governance by requiring that *kansayaku* be better trained, willing to execute more rigorous

---

<sup>318</sup> Toru Yoshikawa, 'Changing Characteristics of Corporate Governance in Japan: Influences of Globalization' (1995) 4 Business & the Contemporary World 15.

<sup>319</sup> *ibid.*

<sup>320</sup> *ibid.*

<sup>321</sup> Yoshikawa (n 62).

<sup>322</sup> Mitsuru Mizuno and Isaac T. Tabner, 'Corporate Governance in Japan and the UK: Codes, Theory and Practice' (2009) 14 (5) Pacific Economic Review 622.

<sup>323</sup> This is equivalent to approximately US\$80,000 based upon 2014 exchange rates.

<sup>324</sup> Mizuno & Tabner (n 322).

<sup>325</sup> *ibid.*

monitoring and willing to exert greater authority<sup>326</sup>.

*Kansayaku* are responsible for monitoring the board of directors. The Commercial Code requires that companies:

- elect three or more *kansayaku*;
- ensure that no less than half of the *kansayaku* are outsiders; and
- elect full-time statutory auditors<sup>327</sup>.

The election of outsiders has, as one of its goals, the reinforcing of the auditing function. However, the entire revision aims to ensure the protection of investors and maintain confidence in the securities market.<sup>328</sup>

In the *kansayaku system*, the board of directors (*torishimariyaku*) is responsible for strategic policy making and supervising top management decision-making. The Commercial Code does not require that companies adopting the *kansayaku* system appoint an outside director.<sup>329</sup>

The majority of board members are insiders and come from the ranks of employees. A directorship in most of Japanese companies is still seen as a reward for those employees who survive a long internal competition.<sup>330</sup> Heftel's<sup>331</sup> survey shows that employees who did not excel enough to become a director are often appointed as statutory auditors.

In 2002, the government announced a new corporate governance system that allowed Japanese companies to select either the traditional *kansayaku* system or a new 'committees' system. The committees system is similar to the system adopted by listed US firms. The board of directors is responsible for monitoring the management and an executing role is delegated to executive officers.<sup>332</sup>

In addition to board-management separation, the board of directors is required to have the following three committees under the committee system: an auditing committee, an appointment committee and a remuneration committee<sup>333</sup>. Miyajima *et al.*<sup>334</sup> argue that this is the most significant departure of the system from the traditional mode.

Each committee consists of at least three directors of which a majority have to be outsiders

---

<sup>326</sup> *ibid.*

<sup>327</sup> *ibid.*

<sup>328</sup> *ibid.*

<sup>329</sup> Yoshikawa (n 62).

<sup>330</sup> Gerlach (n 303).

<sup>331</sup> Christopher Lee Heftel, 'Corporate Governance in Japan: The Position of Shareholders in Publicly Held Corporations' (1983) 5 University of Hawaii Law Review 135.

<sup>332</sup> Charkham (n 304); see also T. Yoshikawa and J. Linton, 'The Applicability of North American Corporate Governance and Investor Relations Practice to Japanese Firms: Theoretical Support and Preliminary Investigation' (2000) 16 Journal of Asian Business 1.

<sup>333</sup> *ibid.*

<sup>334</sup> Miyajima, Aoki & Jackson (n 301).

(although the overall board may have a minority of inside directors). These committees have the following functions:

- an auditing committee – monitoring of directors and executive officers; the appointment and removal of accounting auditors;
- an appointment committee – the appointment and removal of directors;
- a remuneration committee – policy and decisions concerning remuneration of directors and executive officers.<sup>335</sup>

Despite the fact that the system offers more protection to minority investors and outside stakeholders compared to the *kansayaku* system, 97.3% of Japanese companies choose to adopt the *kansayaku* system. By 2008, the committee system was only adopted by 47 first section TSE listed companies, comprising a mere 2.7% of all the listed companies<sup>336</sup>.

**Table 2.** Organisational structure of the Tokyo Stock Exchange first section (%)<sup>337</sup>

	Number of companies		Percentage	
	2006	2008	2006	2008
Companies adopting the <i>kansayaku</i> system	1637	1670	97.0	97.3
Companies with a committee system	50	47	3.0	2.7
Total	1687	1717	100.0	100.0

Those who are critical of the committee system often mention that there are difficulties in finding appropriate outsiders who can be appointed as board members in the Japanese context, where the executive labour market is not as developed as in the US<sup>338</sup>. Some are also uncertain about whether outsiders who might not be very familiar with the business practices of a firm for which they serve as independent directors can perform their function efficiently. It is argued that those who perform the controlling role of the management should have both industry and managerial know-how.<sup>339</sup>

According to Mizuno and Tabner<sup>340</sup>, approximately 56% of *kansayaku* companies did not appoint an outsider director in 2008. However, they note that this percentage has dropped in comparison to 2006. They also maintain that *kansayaku* companies with foreign shareholders tend to elect outside directors as the foreign shareholder ratio rises. For example, *kansayaku* companies

<sup>335</sup> Yoshikawa (n 62).

<sup>336</sup> Mizuno & Tabner (n 322).

<sup>337</sup> *ibid.*

<sup>338</sup> Miyajima, Aoki and Jackson (n 301).

<sup>339</sup> *ibid.*

<sup>340</sup> Mizuno & Tabner (n 322).

with a foreign shareholder ratio of more than 30% elected an average number of 1.5 outside directors in 2008, designating the relationship between the foreign shareholder ratio and the average number of outside directors.<sup>341</sup> Most *kansayaku* companies that decided not to appoint outside directors justified their decision by stating that their governance system had functioned adequately<sup>342</sup>.

**Table 3.** Adoption ratio and the average number of outside directors of the Tokyo Stock Exchange-listed companies (*kansayaku* companies; foreign shareholder ratio)<sup>343</sup>

	Less than 10%		From 10% to less than 20%		From 20% to less than 30%		No less than 30%	
	Adoption ratio (%)	Average number	Adoption ratio (%)	Average number	Adoption ratio (%)	Average number	Adoption ratio (%)	Average number
2006	39.2	0.65	39.4	0.68	44.7	0.87	50.6	1.12
2008	41.0	0.66	42.0	0.71	50.7	0.94	60.7	1.50

There has been a dispute in Japan during the past 15 years over whether or not to impose on Japanese listed companies a legal obligation of appointing one outside/independent director<sup>344</sup>.

Yoshikawa and Phan<sup>345</sup> note that the independence of outside directors is rare in companies in Japan. In line with the Commercial Code, outsiders are defined as those who have never served for a company (or any its subsidiaries) for which they work as a director. This means that those people who have business or professional relationships with a company as well as managers and employees of the company's parent company are seen as outsiders. As Yoshikawa and Phan<sup>346</sup> declare, the majority of the outside directors of Japanese companies are from banks and affiliated or parent companies.

'Independent directors' refer to 'outside directors who additionally have no material relationship with the corporation as measured by the relevant independence standard'<sup>347</sup>. The standards of the TSE enumerates five groups of individuals who would normally not be independent, such as business managers, individuals from major clients, outside professionals whose organisations are major clients, major shareholders, and close relatives<sup>348</sup>.

<sup>341</sup> *ibid.*

<sup>342</sup> *ibid.*

<sup>343</sup> *ibid.*

<sup>344</sup> *ibid.* See also Narioka (n 68).

<sup>345</sup> Toru Yoshikawa and Philip H. Phan, 'Alternative Corporate Governance Systems in Japanese Firms: Implications for a Shift to Stockholder-Cantered Corporate Governance' (2001) 18 *Asia Pacific Journal of Management* 183.

<sup>346</sup> *ibid.*

<sup>347</sup> Yoshikawa (n 62).

<sup>348</sup> *ibid.*

In addition, since directors can concurrently work as executive officers, the roles of strategic decision-making and execution of strategy might not be clearly detached<sup>349</sup>.

In fact, according to Yoshikawa<sup>350</sup>, a significant number of companies have decided to separate the roles of executive officers and directors. For example, Sony Corporation undertook a serious boardroom reform in 1997. From the late 1990s to 2000, for example, Orix Corporation, Toshiba, Nissan Diesel, and NEC restructured their boards by decreasing the number of directors and separating the roles of CEOs and chairmen. A survey conducted by Nihon Keizai Shimbun<sup>351</sup> in 1999 reports that 36% of the respondents in this survey had made the roles of the board members and executive officers distinct from each other. In line with the survey, this separation often resulted in the reduction of the board size, since many directors are also executive officers.

Research, conducted by Yoshikawa and Phan<sup>352</sup>, found that the percentage of outside directors, the separation of the board members and executive officers, and the reduction of board dimension is not related with return on assets or stock returns. On the other hand, the same study did find that involvement of outside directors in strategic decision making has a positive impact on stock returns. It surveyed the outcome of the boardroom reforms only after a fairly short period of time, and therefore there is a possibility that it has not been reflected yet in the performance measures<sup>353</sup>.

It is often argued that the competitive advantage of Japanese companies lies in their employees' commitment to their companies and in the company-specific knowledge of the directors. Thus, there is concern that switching to a shareholder model might erode Japanese companies' long-term competitiveness.<sup>354</sup>

In contrast, Aronson<sup>355</sup> argues that further hybridisation might be the future of Japanese corporate governance. This should combine the best elements of the board management and monitoring models. If implemented properly – in Yoshikawa's<sup>356</sup> opinion – it will enhance the effectiveness of the company's internal governance mechanism.

I go back to the issue of board hybridisation in chapter VI, where I consider the possibility of copying the Japanese alternative board system in Poland.

Below, I briefly elaborate on how the training system for directors in Malaysia was reformed, despite the fact that this may not be considered as hybridisation of corporate

---

<sup>349</sup> *ibid.*

<sup>350</sup> *ibid.*

<sup>351</sup> *ibid.*

<sup>352</sup> Yoshikawa & Phan (n 315).

<sup>353</sup> Yoshikawa (n 62).

<sup>354</sup> Hiroyuki Itami, *Japanese Style Corporate Governance* (Nihon Keizai Shimbunsha 2000) 29.

<sup>355</sup> Aronson (n 66).

<sup>356</sup> Yoshikawa (n 62).

governance. Nonetheless, the training system has a significant impact on the functioning of business, as it may improve company directors' industry and managerial know-how (see section B of this chapter and the section below). This is particularly essential in light of discussions about the value of the one-tier and two-tier board systems of corporate governance.

With respect to corporate governance in Japan, there is a link between the Malaysian training system and the board reforms implemented in Japan – in that Malaysian authorities also aimed to improve the contribution of management to the overall board performance.

## **F. THE UNIQUE SYSTEM FOR TRAINING DIRECTORS IN MALAYSIA**

This unique system was created and introduced by the Bursa Malaysia Securities<sup>357</sup>, and involved mandatory training for all directors of public listed companies. It should be noted that Malaysia is probably the only country in the world where director training was mandatory<sup>358</sup>.

The so-called Mandatory Accreditation Program (MAP) was a temporary initiative, implemented in January 2001<sup>359</sup>. The MAP embraced the major issues of corporate governance, eg the duties, responsibilities and liabilities of directors, risk management and the legal framework. Those who had gone through the MAP were subject to a Continuing Education Program from July 2003. Under this program directors were required to collect at least 48 CEP points a year by taking part in appropriate seminars or courses to keep themselves up-to-date with the latest knowledge.<sup>360</sup>

On the Mondovisione World Exchange Intelligence<sup>361</sup> website, we can read that the mandatory training system for corporate officials in Malaysia '[has] created greater awareness [of] the significance of continuous training and skill enhancements for directors and it has promoted a culture of continuous learning and training. To date, approximately 6,329 [d]irectors have attended the MAP whilst 3,553 directors have attended the CEP.'

Despite this achievement, Bursa Malaysia Securities ruled that the boards of directors of the respective public listed companies should be responsible for determining the training

---

<sup>357</sup> Previously known as Kuala Lumpur Stock Exchange.

<sup>358</sup> Philip Koh Tong Ngee (n 50).

<sup>359</sup> *ibid.*

<sup>360</sup> *ibid.*

<sup>361</sup> Mondovisione World Exchange Intelligence, 'Bursa Malaysia Securities: Boards of Listed Companies to Be Responsible for Continuing Education of Directors' (30 September 2004) <[www.mondovisione.com/media-and-resources/news/bursa-malaysia-securities-boards-of-listed-companies-to-be-responsible-for-conti/](http://www.mondovisione.com/media-and-resources/news/bursa-malaysia-securities-boards-of-listed-companies-to-be-responsible-for-conti/)> accessed 28 August 2013.



needs of their directors with effect from 1 January 2005<sup>362</sup>.

According to Yusli Mohamed Yusoff<sup>363</sup>, continuous education is important for keeping directors updated on regulatory and corporate governance developments, in addition to enhancing the professionalism and knowledge of directors by enabling them to discharge their duties more effectively. Philip Koh Tong Ngee<sup>364</sup> maintains that an effective director needs to be well-versed in, among other things, financial literacy, strategic planning, human resource development and the vagaries of the business environment. Finally, the OECD Principles of Corporate Governance<sup>365</sup> suggests that board members should act on a fully informed basis, which would mean acquiring a certain level of experience, competency and training.

Corporate practice in Malaysia seems to be different. Most respondents of a survey conducted by Philip Koh Tong Ngee<sup>366</sup> indicate that training is only given to directors only on an occasional basis. Boo Yeang Khoo<sup>367</sup> suggests that the cause might be the high cost of training for directors. In this regard, he proposes that the government could give tax incentives to companies. Boo Yeang Khoo<sup>368</sup> also suggests that companies should disclose in the annual report, the training sessions attended by directors. In his opinion, this might increase the awareness of how they are important for the development of business.

The available data concerning the mandatory training system in Malaysia does not say what impact it had on the communication level between board members, the quality of board decisions or overall company performance. Therefore, I examined this issue during my research, in particular during my interviews with Polish business practitioners. In this thesis, the outcome of my research in this matter can be found in chapter VI, dedicated to these interviews.

The next subsection concerns the disclosure system in Singapore, which has hybrid features, as it links solutions from different jurisdictions. According to Tan Wee Liang<sup>369</sup>, the Singapore government chose a balanced approach, which is similar to the system that exists in Canada and the United Kingdom.

---

<sup>362</sup> *ibid*; Ho Khai Leong (ed), *Reforming Corporate Governance in Southeast Asia: Economics, Politics and Regulations* (Institute of Southeast Asian Studies 2005) 253.

<sup>363</sup> Mondovisione Intelligence (n 361).

<sup>364</sup> Philip Koh Tong Ngee (n 50).

<sup>365</sup> Available on <[www.oecd.org/corporate/oecdprinciplesofcorporategovernance.htm/](http://www.oecd.org/corporate/oecdprinciplesofcorporategovernance.htm/)> accessed 30 July 2013.

<sup>366</sup> Philip Koh Tong Ngee (n 50).

<sup>367</sup> Boo Yeang Khoo, 'Review of Corporate Governance in Asia: Corporate Governance in Malaysia' (Asian Development Bank Institute 2003) <[www.adbi.org/conf-seminar-papers/2004/08/18/532.corporate.governance.malaysia/](http://www.adbi.org/conf-seminar-papers/2004/08/18/532.corporate.governance.malaysia/)> accessed 17 August 2013.

<sup>368</sup> *ibid*.

<sup>369</sup> Tan Wee Liang (n 60).

## G. THE DISCLOSURE SYSTEM IN SINGAPORE

### 1. The switch from merit-based regulation to a disclosure-based system

Tan Wee Liang<sup>370</sup> explains that the main idea of the reform of the disclosure system in Singapore was to avoid two extremes: a prescriptive approach, under which companies must comply (merit-based regime) and a non-prescriptive self-regulatory approach where every company is free to adopt its own practices (disclosure-based regime)<sup>371</sup>.

This change was implemented in several steps. The most crucial step was, probably, the acceptance of a code of corporate governance by the Singapore government in April 2001. The Singapore Code of Corporate Governance was first issued by the Corporate Governance Committee in March 2001, and implemented from January 2003<sup>372</sup>. It came under the purview of the Monetary Authority of Singapore and Singapore Stock Exchange, with effect from September 2007.<sup>373</sup>

Compliance with the Singapore Code of Corporate Governance is not mandatory but listed companies are required, under the Singapore Exchange Listing Rules, to disclose their corporate governance practices and give explanations for deviations from it in their annual reports<sup>374</sup>. The aim of this document is to encourage Singapore-listed companies to enhance shareholder value through good corporate governance<sup>375</sup>.

Apart from board and remuneration matters, the Code of Corporate Governance sets out principles and best practices to improve the quality of corporate financial reporting. It clarifies the apparatus to safeguard the company's assets and resources (accountability and audit; internal controls) as well as accountability to shareholders through effective and comprehensive communications. The accounting, audit, internal audit and accountability to shareholders principles work towards strengthening companies' corporate governance practices.<sup>376</sup> Through board monitoring, 'these changes will limit the discretion management has on the nature and extent of

---

<sup>370</sup> *ibid.*

<sup>371</sup> However, it is likely that disclosure practices will fall within a spectrum that ranges from fully merit-based to fully disclosure-based. For instance, some basic requirements for public offering and listing are of a merit nature since the listing company will have to abide by them before it qualifies for membership in the exchange. *ibid.*

<sup>372</sup> A revised version of the Code is available on <[www.mas.gov.sg/regulations-and-financial-stability/regulatory-and-supervisory-framework/corporate-governance/corporate-governance-of-listed-companies/code-of-corporate-governance.aspx](http://www.mas.gov.sg/regulations-and-financial-stability/regulatory-and-supervisory-framework/corporate-governance/corporate-governance-of-listed-companies/code-of-corporate-governance.aspx)> accessed 24 June 2014. See also Ernst & Young, 'Revised Code of Corporate Governance' (2012) 12 Board Matters Quarterly <[www.ey.com/SG/en/Services/Assurance/Board-Matters-Quarterly---Issue-12---June-2012---Revised-Code-of-Corporate-Governance](http://www.ey.com/SG/en/Services/Assurance/Board-Matters-Quarterly---Issue-12---June-2012---Revised-Code-of-Corporate-Governance)> accessed 27 June 2014.

<sup>373</sup> Wee Liang Tan and Teck Meng Tan, 'The Impact of Corporate Governance on Value Creation in Entrepreneurial Firms' (Singapore Management University, undated) <[works.bepress.com/weeliang\\_tan/7](http://works.bepress.com/weeliang_tan/7)> accessed 29 September 2012.

<sup>374</sup> *ibid.*

<sup>375</sup> *ibid*; Art. 1 of this Code.

<sup>376</sup> Tan Wee Liang (n 60).

information disclosed in annual reports.<sup>377</sup>

Efforts to develop a disclosure-based regulatory regime continued rapidly. The MAS implemented the Securities and Futures Act (SFA) and Financial Advisers Act in October 2002 to maintain fair and efficient markets. While the Singapore Exchange (SGX) is entrusted with the day-to-day running of the market, the MAS has the job of overseeing the development of the financial markets, and that includes its disclosure regulations<sup>378</sup>. Issuers are, *inter alia*, required to lodge their prospectus with the MAS for a two-week period during which they will be published for public comment before they are registered. The MAS may refuse to register a prospectus if it does not comply with this requirement. The SFA also permits the MAS to stop an offer if a registered prospectus is later on found to be misleading or substandard.<sup>379</sup>

The SFA has also attempted to develop disclosure in the secondary market, the idea being to make continuous disclosure of material information by listed companies a statutory requirement (formerly a listing requirement of the securities exchange). Substantial shareholders of a listed company had previously been required (under the Companies Act) to notify the company of their shareholdings and changes thereto within two days of their trades. The SGX requires the company to disclose such notifications to the SGX.<sup>380</sup> The SFA makes disclosure to the SGX a legal responsibility by necessitating fairly large shareholders of listed companies to notify the SGX of their trades in a straight line<sup>381</sup>.

In order to ensure that the capital market remains confident in the integrity, transparency and quality of corporate financial reporting, the Accounting and Corporate Regulatory Authority (ACRA) introduced the Financial Reporting Surveillance Programme in 2011<sup>382</sup>. The FRSP also aims to rebalance the roles of supervision of financial reporting between the auditors and the directors. Directors are expected to pay close attention to the financial statements and perform their legal duties thoroughly.<sup>383</sup>

Under the Companies Act (Chapter 50), directors of companies incorporated in Singapore, as well as Singapore branches of foreign companies, are responsible for the preparation of true and

---

<sup>377</sup> Kala Anandarajah, 'Whither Corporate Governance in Singapore – Are Smaller Cap Companies Worst Off?' *Pulses* (Singapore, April 2005).

<sup>378</sup> James Farr, 'Into the Great Wide Open' *IR Magazine* (Singapore, March 2006) <[www.IRontheNET.com/feature](http://www.IRontheNET.com/feature)> accessed 30 September 2013.

<sup>379</sup> Tan Wee Liang (n 60).

<sup>380</sup> Farr (n 378).

<sup>381</sup> *ibid*; see also Monetary Authority of Singapore, 'Developing the Disclosure-Based Regime for Singapore's Capital Markets. Annual Report, 2001-2002' <[www.mas.gov.sg/about-mas/reporting/~media/resource/about\\_us/annual\\_reports/annual0102/AnnualReport.ashx](http://www.mas.gov.sg/about-mas/reporting/~media/resource/about_us/annual_reports/annual0102/AnnualReport.ashx)> accessed 28 September 2013.

<sup>382</sup> KPMG, 'Financial Reporting Matters' (June 2014) <[www.kpmg.com/sg/en/IssuesAndInsights/frm/Issue47-Jun2014.pdf](http://www.kpmg.com/sg/en/IssuesAndInsights/frm/Issue47-Jun2014.pdf)> accessed 28 June 2014.

<sup>383</sup> *ibid*.

fair financial statements that are in compliance with Singapore Financial Reporting Standards. In addition, directors are also required to maintain a system of internal accounting controls and keep proper accounting and other records to enable the preparation of true and fair profit and loss accounts and balance sheets.

The ACRA has stepped up efforts to review financial statements in order to monitor compliance with the Companies Act and Singapore Financial Reporting Standards<sup>384</sup>. Directors who are legally responsible for the preparation of financial statements will also be personally liable for all breaches identified by the ACRA under the FRSP. Thus, the change is that the ACRA is now actively checking the quality of financial reporting to ensure that the directors are correctly carrying out their legal duties.<sup>385</sup>

In order to supervise the areas of accounting standards and corporate governance review, the government established the Council on Corporate Disclosure and Governance (CCDG) in 2002. The CCDG was replaced by the Accounting Standards Council (ASC) in 2007.<sup>386</sup> The ASC is responsible only for the formulation and promulgation of accounting standards. It, *inter alia*, reviews and enhances the existing framework on corporate governance and promote good corporate governance in Singapore whilst taking into account international best practices. The monitoring and enforcement of compliance with accounting standards for companies remains the prerogative of the ACRA.<sup>387</sup>

One best practice that ought to be highlighted lies in the establishment of an audit committee at the board level 'as the arena for oversight over management in terms of financial and non-financial disclosures'<sup>388</sup>. Singapore incorporated the provision into its Companies Act (Section 201B) and in the listing requirements of the Singapore Exchange.

The audit committee is to be appointed by the directors. The committee is to comprise no less than three members of the board of directors, and must be chaired by a non-executive director, who is not employed by the company or its related companies. A majority of the committee must also be independent non-executive directors. Survey results show that most of the listed companies meet this minimum requirement.<sup>389</sup>

In March 2002, the MAS announced that it is compulsory for banks to rotate their external audit companies every five years. Also mandatory for banks are audit committees consisting of non-executive members, of which majority have to be independent.<sup>390</sup>

---

<sup>384</sup> KPMG, 'Financial Reporting Matters (...)' (n 382).

<sup>385</sup> *ibid.*

<sup>386</sup> Deloitte, 'Singapore' (undated) <[www.iasplus.com/en/jurisdictions/asia/singapore](http://www.iasplus.com/en/jurisdictions/asia/singapore)> accessed 23 June 2014.

<sup>387</sup> *ibid.*

<sup>388</sup> Tan Wee Liang (n 60).

<sup>389</sup> *ibid.*

<sup>390</sup> *ibid.*

The shift towards a disclosure-based regime has also been matched by the SGX's exercise of its powers to halt trading of a company's shares, suspend trading or de-list a company's shares. Under Article 14 of the Corporate Governance Code, companies have an obligation to provide accounting information and disclosure. Paragraph 1303 (3) (c) permits the SGX to suspend trading when there is an audit qualification or emphasis of a matter in respect of the issuer (or significant subsidiary) that raises a going concern issue. Paragraph 1303 (4) encompasses an even wider basis for suspension, when the listed company is unable or unwilling to comply with, or contravenes a listing rule.

A disclosure-based regime cannot function properly without an effective market enforcement regime. Therefore, the SFA contains provisions aiming to improve market enforcement. Tan Wee Liang<sup>391</sup> summarises them as follows:

'New laws on insider trading now can capture a wider pool of persons who seek to take advantage of inside information. The civil penalty regime, which allows the MAS to bring an action in Court against a defendant, now embraces all forms of abusive market behavior. Such civil penalty action must be complemented, however, by enhanced investigative powers for the MAS' enforcement officers.'

As Farr<sup>392</sup> informs, '[t]he MAS stresses that the burden is not so much on it to keep eye on companies; rather it is on the companies to bring out the benefit of better disclosure.'

The afore-mentioned changes contributed immensely to the strengthening of the disclosure system in Singapore. As a consequence, Singaporean corporate practices have been highly valued since they were implemented. According to the most recent available ranking – the 2010 corporate governance rankings in eleven markets in Asia conducted by the Asian Corporate Governance Association and Credit Lyonnais Securities Asia-Pacific Markets – Singapore is ranked first – up from second in the previous rankings in 2007<sup>393</sup>. It had previously been considered the best in Asia by the Asian Corporate Governance Association<sup>394</sup> in its annual rankings of Asian countries from 2000 to 2004. In addition, the World Competitiveness Report, in the same five-year period, placed Singapore in the top ten position for the effectiveness of its corporate boards in

---

<sup>391</sup> *ibid.*

<sup>392</sup> Farr (n 378).

<sup>393</sup> KPMG, 'Singapore's Corporate Governance (...)' (n 59).

<sup>394</sup> Asian Corporate Governance Association, 'Country Rankings: "CG Watch"' (2005) <[www.acga-asia.org/public/files/ACGA\\_Fidelity\\_talk\\_April05.pdf](http://www.acga-asia.org/public/files/ACGA_Fidelity_talk_April05.pdf)> accessed 23 September 2013.

supervising the management of a company<sup>395</sup>. In 2005, Singapore was ranked 11<sup>th</sup><sup>396</sup>.

For Tan Wee Liang<sup>397</sup> part of the success is Singapore's migration to a disclosure-based regime. Teh Hooi Ling<sup>398</sup> argues that there has to be a set of basic mandatory standards, and, in addition to that, companies should be 'encouraged, in a voluntary way, to adopt a set of best practices, as spelt out in the Code of Corporate Governance.'

The agency concept suggests that shareholders have less knowledge of the company and its functioning than the managers do<sup>399</sup>. As a result, companies have begun to install corporate governance that will better align shareholders' and managers' interests. Simultaneously, company managers have started conveying sensitive information, which was formerly given to a certain group of managers and business analysts exclusively, to their shareholders.<sup>400</sup>

Yet, these practices come at a high price. In order to enjoy any incremental benefits, the growth in value should be greater than the cost of installing the governance and disclosure practices<sup>401</sup>.

The OECD<sup>402</sup> highlights that the key idea that should be utilised in disclosures is materiality. Material information can be defined as 'information whose omission or misstatement could influence the economic decisions taken by its users'<sup>403</sup>.

An observer<sup>404</sup> points out as the following:

'The decision of the regulators to introduce Sarbanes-Oxley types interventions in the financial reporting processes and controls, executive certification of financial statements and the processes that generate them, while welcome, is not to be taken lightly as compliance may drive up the cost of doing business. Too much intervention may also dilute the attractiveness of Singapore to foreign investors, and its cost may far exceed the benefits of reining in only a few rogues.'

---

<sup>395</sup> IMD World Competitiveness Center (WCC), 'World Competitiveness Yearbook 2000', 'World Competitiveness 2004' <[www.imd.org/wcc/wcy-world-competitiveness-yearbook-online/](http://www.imd.org/wcc/wcy-world-competitiveness-yearbook-online/)> accessed 7 October 2013.

<sup>396</sup> IMD World Competitiveness Center (WCC), 'World Competitiveness Yearbook 2005' <[www.imd.org/wcc/wcy-world-competitiveness-yearbook-online/](http://www.imd.org/wcc/wcy-world-competitiveness-yearbook-online/)> accessed 7 October 2013.

<sup>397</sup> Tan Wee Liang (n 60).

<sup>398</sup> Teh Hooi Ling in *ibid.*

<sup>399</sup> *ibid.*

<sup>400</sup> *ibid.*

<sup>401</sup> Donc, 'Corporate Valuation, Corporate Disclosure & Corporate Governance' (*Oaktree Research*, 11 November 2003) <[www.oaktree-research.com/index.php?option=content&task=view&id=45](http://www.oaktree-research.com/index.php?option=content&task=view&id=45)> accessed 23 September 2013

<sup>402</sup> OECD, 'OECD Principles (...)' (n 232).

<sup>403</sup> *ibid.*

<sup>404</sup> Tan Wee Liang (n 60).

According to Banerjee<sup>405</sup>, Singapore has fairly high standards of corporate disclosure compared to its neighbours in the Asian region as well as the US and European countries, but the sought – after middle ground between a compulsory and driven by the market powers system of disclosure has not been accomplished yet.

There are a number of different proposals on how to completely move to the disclosure-based regime.

## 2. The way forward

Teh Hooi Ling<sup>406</sup> refers to the Brazilian disclosure system, where the Bovespa stock market is stratified along corporate governance lines.

Due to the fact that companies in Brazil issue a high number of non-voting shares, dominant shareholders can legally exercise control over listed companies that own only a 17% of shares. However, companies can voluntarily choose to list on Bovespa's 'Level 1' by implementing additional disclosures or by listing on 'Level 2' by granting limited voting rights to non-voting shareholders. Thus, as Teh Hooi Ling<sup>407</sup> states, companies have two choices: 'attract investors and raise capital more cheaply by giving up some control or adhere to standards that are more stringent than is required by law.'<sup>408</sup>

Teh Hooi Ling<sup>409</sup> argues that Singaporean companies could be divided based on their level of corporate governance and disclosure standards, instead of being segregated into the main board and the second board based on size. In this scenario, those that decided to be listed on 'Level 1 or Tier 1' would have to fulfil all the best practices of good corporate governance, such as 'transparency and timeliness of accounts, compliance with the spirit of applicable codes, etc.' As a result, the risk premium would likely lower: 'their share price would command higher valuations and they could obtain loans at a cheaper rate.'<sup>410</sup>

According to Anandarajah<sup>411</sup>, 'corporations in Singapore are not on a level-playing field, which makes it difficult to sustain a regime of self-enforcement and disclosure.' She stresses the need for better enforcement and supervision, in particular with respect to smaller companies, which can be achieved through more intense examination of their corporate governance practices

---

<sup>405</sup> Gautam Banerjee in Anandarajah (n 377).

<sup>406</sup> Teh Hooi Ling (n 398).

<sup>407</sup> *ibid.*

<sup>408</sup> *ibid.*

<sup>409</sup> *ibid.*

<sup>410</sup> *ibid.*

<sup>411</sup> Gautam Banerjee in Anandarajah (n 377).

and internal control tools.

It is clear that introducing more rules and regulations does not necessarily improve corporate disclosure. For that reason Banerjee<sup>412</sup> recommends a holistic approach in evaluating newly listed smaller companies by focusing enforcement on the following aspects:

- ‘- corporate/organizational codes of conduct,
- compliance and ethics awareness and training,
- properly documented policies and procedures that are adhered to, and
- demonstrating expected behaviour [-] particularly by directors and senior management.’

Wee Liang Tan and Teck Meng Tan<sup>413</sup> report that the applicability of disclosure and transparency with regard to small companies might be questionable, because:

‘[c]orporate governance is largely tied in with larger companies, which are confounded by the agency problem. The agency problem comes about when members of an organization have conflicts of interests, which in turn arises within a firm when there is no separation between ownership and management. At first glance, corporate governance would not apply to SMEs [small enterprises] since the agency issues are less likely to subsist. SMEs are not accountable to the public since they have not accessed the investing public for funding.’<sup>414</sup>

Another essential step to improve disclosure practices is also training. Banerjee<sup>415</sup> argues that mandating training might not be the ideal solution. However, efforts must be made to ensure that companies execute effectual training for their directors and key officers, and not just pay lip service to it. In particular, newly listed companies should be required to organise training programmes for directors before (rather than after) the initial public offering process.

The disclosure-based regulation does require surveillance and strong enforcement to discourage and penalise those who would bend or break the rules, according to DeSilva<sup>416</sup>. She proposes maximum penalties under the SFA for those who breach disclosure requirements: ‘On this score, the MAS has to continue to build up its enforcement capabilities to undertake investigation and civil penalty action. To support its enforcement activities, the MAS has acquired a market surveillance system to enhance its capability in detecting irregular trading activities’<sup>417</sup>.

---

<sup>412</sup> *ibid.*

<sup>413</sup> Wee Liang Tan & Teck Meng Tan (n 373).

<sup>414</sup> *cf* Jamie Allen in Tan Wee Liang (n 60).

<sup>415</sup> *ibid.*

<sup>416</sup> Susan de Silva, ‘Has the Disclosure Regime Failed? *Business Times* (Singapore, 18 December 2004) 10.

<sup>417</sup> Monetary Authority of Singapore (n 381).



The maximum fine is \$250,000 and/or up to seven years' imprisonment, and a civil penalty—payable to the MAS—at up to three times the gain made or loss avoided<sup>418</sup>.

Whistle-blowers are not paid informants, and the least that could be done is to protect them from reprisals, points out Teen<sup>419</sup>. According to Wan<sup>420</sup>, A 2004 survey done by the Association for Certified Fraud Examiners in the US showed that almost 40% of frauds are uncovered thanks to a tip-off. A KPMG study on fraud in Singapore found that almost 53% of fraud cases are discovered due to notification by external parties, informants or anonymous letters. This definitely makes a whistle-blowing programme a most powerful instrument in identifying management fraud.<sup>421</sup>

Nevertheless, top management might not be motivated enough to install a whistle-blowing programme, since it is a cost item. Therefore, Wan<sup>422</sup> declares that an idea worthy of consideration is passing a law that would require listed companies to have a whistle-blowing agenda. This has already been implemented in the US through the SOX act. The law would have to be coupled with very strong commitment from management to support whistle-blowing and trust in the people who utilise the system, suggests Teen<sup>423</sup>.

## G. CONCLUSIONS

This chapter is a review of literature on hybrid corporate governance in selected countries. The definition of a literature review is presented in Section A.

In Section B, I explain the notion of hybrid corporate governance as well as such issues as:

- legal transplant;
- enlightened shareholder; and
- stakeholder inclusivity values.

as well as:

- the 'comply or else';
- the 'comply or explain'; and
- the 'apply or explain' principles.

They are then developed in further parts of this thesis.

---

<sup>418</sup> DeSilva (n 416).

<sup>419</sup> Teen in *ibid*.

<sup>420</sup> *ibid*.

<sup>421</sup> *ibid*.

<sup>422</sup> Wan in *ibid*.

<sup>423</sup> Teen in *ibid*.

Section C is an analysis of corporate literature concerning hybrid corporate governance in Poland. For example, I briefly describe the attempt to implement a one-tier board system in Poland in the early 1990s.

Finally, in Sections D-F, I elaborate on several hybrid solutions within corporate governance worldwide. Accordingly, I analyse the implementation of stakeholder inclusivity in South Africa, the alternative board system in Japan, the mandatory programme of training for directors in Malaysia and the new disclosure-based system in Singapore.

The next chapter is dedicated to corporate governance in the US and the UK, as they created the legal foundation for hybrid corporate solutions in the afore-mentioned countries.

## **IV. CORPORATE GOVERNANCE IN THE UNITED STATES AND THE UNITED KINGDOM**

### **A. INTRODUCTION**

As I have already shown in the previous chapter, a combination of American and British solutions in the area of corporate governance, with certain local factors/solutions in South Africa and several Asian countries, created hybrid corporate governance. As a matter of fact, all corporate systems analysed in chapter III, except for the Japanese system, are traditionally rooted in the Anglo-American corporate governance system. Therefore, it was only natural to write a chapter that would be focused on corporate governance in the United States and the United Kingdom.

Before commencing this chapter, it was necessary to decide whether or not to compare both systems with the Polish system of corporate governance in the same chapter. However, I eventually split my analysis of those systems into two separate chapters, a chapter dedicated to Polish corporate governance and a chapter that elaborates on the main aspects of corporate governance in the US and the UK. I assumed that a comparative analysis of the Polish system and the Anglo-American approach to corporate governance would not be appropriate in the same chapter for the following reasons:

- The research topic concerns the possibility of implementation of hybrid corporate governance in Poland, and therefore, in this thesis, there should be a separate chapter on the Polish corporate governance system.
- Significant differences do not only exist between the Polish and the Anglo-American approaches to corporate governance. There are also certain dissimilarities between corporate governance in the US and the UK. Therefore, presenting them in a clear manner as well as, simultaneously, analysing American, British and Polish corporate governance in a comprehensive way could be difficult.

The main goal of this chapter is to show the merits and drawbacks of the American and British corporate governance systems. Moreover, this chapter aims to reinforce my discussion on corporate hybridisation in the previous chapter. Accordingly, in this chapter, I go back to the issue of a compliance framework, shareholder value and a board of directors. I analyse how they are regulated in the US and the UK, how they are linked to those hybrid solutions in chapter III, and, briefly, how those regulations differentiate from each other and their Polish equivalents.

In this chapter, I also raise the issue of directors' remuneration and its disclosure, which is not directly connected with hybridisation of corporate governance. However, it was important to include this issue within my research due to the fact that it was raised by my research participants

during interviews. Presented from the Anglo-American perspective, it better exposes the weaknesses of the Polish approach with regard to this issue.

The next subsection is dedicated to the 'comply or else' and 'comply or explain' principles, whose application created the most significant difference between the American and British approaches to corporate governance.

## **B. 'COMPLY OR ELSE' VS 'COMPLY OR EXPLAIN'**

While the British system of corporate governance is based on the 'comply or explain' basis, the American system is to a certain extent regulated by a statute, which is called the 'comply or else' approach. One could say that the fundamentals of British corporate governance are also regulated by an act, or rather, a statute, the Companies Act of 2006. However, while the American SOX act (2002) imposes on companies the obligation to comply with certain provisions, mainly concerning annual financial reporting and accounting, their application in the UK is optional.

The Sarbanes-Oxley Act has mainly been criticised for the costs of involved with complying with it. According to the Securities and Exchange Commission (SEC)<sup>424</sup>, during 2004, companies with revenues exceeding \$5 billion spent 0.06% of revenue on SOX compliance, while companies with less than \$100 million in revenue spent 2.55%. Paul<sup>425</sup> argue that this places US companies at a competitive disadvantage with foreign firms, taking businesses out of the United States. In line with the Wharton Business School<sup>426</sup>, the number of companies deregistering from public stock exchanges nearly tripled during the year after SOX came into force, while the New York Stock Exchange noted only 10 new foreign listings in 2004. As Piotroski and Srinivasan<sup>427</sup> declare, in 2008, smaller international companies were more likely to list on stock exchanges in the UK rather than US stock exchanges.

Critics also blamed SOX for the small number of Initial Public Offerings on US stock exchanges in 2008<sup>428</sup>, but there is no consistency in survey results in this matter. The National

---

<sup>424</sup> SEC, 'Final of the Advisory Committee (...)' (n 33).

<sup>425</sup> Ron Paul, 'Repeal Sarbanes-Oxley!' (Reason to Freedom, 14 April 2005) <[www.reasontofreedom.com/repeal\\_sarbanes\\_oxley\\_by\\_us\\_rep\\_ron\\_paul.html](http://www.reasontofreedom.com/repeal_sarbanes_oxley_by_us_rep_ron_paul.html)> accessed 15 October 2013.

<sup>426</sup> *ibid.*

<sup>427</sup> Joseph D. Piotroski and Suraj Srinivasan, 'Regulating and Bonding: The Sarbanes-Oxley Act and the Flow of International Listings' (2008) 46 (2) *Journal of Accounting Research* 383.

<sup>428</sup> Newt Gingrich and David W. Kralik, 'Repeal Sarbanes-Oxley' (*SF Gate*, 5 November 2008) <[www.sfgate.com/politics/article/Repeal-Sarbanes-Oxley-3186747.php](http://www.sfgate.com/politics/article/Repeal-Sarbanes-Oxley-3186747.php)> accessed 12 October 2013.

Venture Capital Association's<sup>429</sup> survey shows that, in all of 2008, there were only six companies that went public. According to Hoover's IPO Scorecard<sup>430</sup>, however, 31, not six companies went public on the main US stock exchanges in 2008.

Hoover's<sup>431</sup> review from 2001 also proves that, before SOX was adopted, the number of IPOs declined to 87 in 2001, well down from previous highs. In 2004, IPOs raised up 195% from the previous year to 233<sup>432</sup>. There were 196 IPOs in 2005, 205 in 2006 (with a sevenfold increase in deals over \$1 billion) and 209 in 2007<sup>433</sup>.

In addition, according to the annual survey of the Finance Executives International (FEI)<sup>434</sup>, the costs of SOX Section 404 have continued to decline relative to revenues since 2004. The 2007 study shows that, for 168 companies with regular revenues of \$4.7 billion, the regular compliance costs were \$1.7 million (0.036% of revenue)<sup>435</sup>. The 2006 study indicates that, for 200 companies with regular revenues of \$6.8 billion, the regular compliance costs were \$2.9 million (0.043% of revenue), down 23% from 2005. Costs for decentralised companies (those with multiple segments or divisions) were significantly more than those for centralised companies. Survey scores related to the positive effect of SOX on investor confidence, reliability of financial statements, and fraud preclusion continued to rise. However, when participants were asked in 2006 whether the benefits of compliance with Section 404 surpassed costs in 2006, only 22% agreed<sup>436</sup>.

The Lord & Benoit Report<sup>437</sup> shows that '(...) those [companies] with no material weaknesses in their internal controls, or companies that corrected them in a timely manner, experienced much greater growths in share prices than companies that did not.' In addition, the benefits to a compliant company in share price (10% above Russell 300 index) were larger than their SOX Section 404 costs.

Skaife *et al.*<sup>438</sup> proves that borrowing costs are lower for companies that improved their

---

<sup>429</sup> Wikipedia, 'Sarbanes-Oxley Act' [www.en.wikipedia.org/wiki/Sarbanes%E2%80%93Oxley\\_Act#Benefits\\_to\\_firms\\_and\\_investors](http://www.en.wikipedia.org/wiki/Sarbanes%E2%80%93Oxley_Act#Benefits_to_firms_and_investors) accessed 14 March 2013.

<sup>430</sup> *ibid.*

<sup>431</sup> Hoover's Inc., 'Hoover's IPO Analysis For 2001 Shows Resurgence of 'Not – Coms' <[www.hooverweb.hoovers.com/about/press-releases/10000407-1.html](http://www.hooverweb.hoovers.com/about/press-releases/10000407-1.html)> accessed 27 October 2013.

<sup>432</sup> PRNewswire, 'Number of IPOs in 2004 Increased by 195%; IPO Activity in Q4 2004 Strongest in More Than Four Years' <[www.prnewswire.com/news-releases/number-of-ipos-in-2004-Strongest-in-more-than-years-53844047.html](http://www.prnewswire.com/news-releases/number-of-ipos-in-2004-Strongest-in-more-than-years-53844047.html)> accessed 17 September 2013.

<sup>433</sup> Wikipedia, 'Sarbanes-Oxley Act' (n 429).

<sup>434</sup> FEI, '(...) Management Drives Sarbanes-Oxley Compliance (...) ' (n 36).

<sup>435</sup> *ibid.*

<sup>436</sup> *ibid.*

<sup>437</sup> Lord & Benoit LLC, 'The Lord & Benoit Report: Do the Benefits of 404 Exceed the Cost?' (8 May 2006) <[www.section404.org/pdf/Lord%20&%20Benoit%20Report%20Do%20the%20Benefits%20of%20404%20Exceed%20the%20Cost.pdf](http://www.section404.org/pdf/Lord%20&%20Benoit%20Report%20Do%20the%20Benefits%20of%20404%20Exceed%20the%20Cost.pdf)> accessed 29 September 2013.

<sup>438</sup> Hollis Ashbaugh Skaife, Daniel W. Collins, William R. Kinney and Ryan LaFond, 'The Effect of SOX Internal Control Deficiencies on Firm Risk and Cost of Equity' (10 June 2008) <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=896760](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896760)> accessed 18 March 2013.

internal control by between 50 and 150 basis points (0.5 to 1.5% points). Arping and Sautner<sup>439</sup> declare the following: '(...) [R]elative to a control sample of comparable firms that are not subject to SOX, cross-listed firms became considerably more transparent following SOX.' The 2007 FEI<sup>440</sup> survey, as well as the Institute of Internal Auditors' study (IIA)<sup>441</sup>, also point out that SOX enhanced investor confidence in financial reporting. Moreover, the IIA study shows improvements in board, audit committee, and senior management engagement in financial reporting as well as improvements in financial controls.

Interestingly, we can notice an opposite occurrence in the British 'comply or explain' approach, which has received less criticism in various business arenas.

According to Arcot *et al.*<sup>442</sup>, British companies do not provide satisfactory explanations on why they do not comply with the Code provisions. In almost one in five cases, firms do not provide any explanations for their non-compliance at all. Even when an explanation is provided, most of the time it fails to identify specific settings that could justify why the company rejected compliance or deviated from the rule (see Appendix 2). Furthermore, companies that do not comply, tend to stick with the same (poor) explanation until they suddenly begin to comply. Once compliant, a company either remains so or, if it stops complying, does not provide convincing explanations as to why this is the case.<sup>443</sup>

For Arcot *et al.*<sup>444</sup>, shareholders, especially of widely-held companies, are actually those who turn out to encourage such behaviour by not paying too much attention to the quality of explanations provided. On the other hand, they have limited monitoring capabilities, largely because of coordination problems, monitoring costs and different incentives, and their intervention often occurs after bad performance. In fact, the market also seems not to respond to explanations on compliance.<sup>445</sup>

By 2012, the FRC<sup>446</sup> proposed to set out the characteristics of an informative explanation in the UK Corporate Governance Code of 2012. As a result, the Code of 2012<sup>447</sup> states that, among other things, a company's explanation should:

---

<sup>439</sup> Stefan Arping and Zacharias Sautner, 'Did SOX Section 404 Make Firms Less Opaque? Evidence from Cross-Listed Firms' (1 August 2012) <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1561619](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561619)> accessed 18 March 2013.

<sup>440</sup> FEI, '(...) Management Drives Sarbanes-Oxley Compliance (...) ' (n 36).

<sup>441</sup> Institute of Internal Auditors, 'Sarbanes-Oxley Section 404 Work: Looking at the Benefits' (2005) <[www.na.theiia.org/standards-guidance/leading-practices/Pages/Sarbanes-Oxley.aspx](http://www.na.theiia.org/standards-guidance/leading-practices/Pages/Sarbanes-Oxley.aspx)> accessed 19 March 2013.

<sup>442</sup> Arcot, Bruno & Faure-Grimaud (n 31).

<sup>443</sup> *ibid.*

<sup>444</sup> *ibid.*

<sup>445</sup> *ibid.*

<sup>446</sup> Financial Reporting Council, 'Feedback Statement. Revisions to the UK Corporate Governance Code and Guidance on Audit Committees' (London, September 2012) <[www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Feedback-statement-on-UK-Corporate-Governance-Code.aspx](http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Feedback-statement-on-UK-Corporate-Governance-Code.aspx)> accessed 20 November 2013.

<sup>447</sup> 'Comply or Explain', page 8.

‘(...) set out the background, provide a clear rationale for the action it is taking, and describe any mitigating actions taken to address any additional risk and maintain conformity with the relevant principle. Where deviation from a particular provision is intended to be limited in time, the explanation should indicate when the company expects to conform with the provision.’

Importantly, almost half of listed companies, questioned by the FRC<sup>448</sup>, were concerned that they would be required to unveil commercially sensitive information or expected to make long and unimportant disclosures<sup>449</sup>.

Despite the alarming survey outcomes with respect to quality of annual reporting, Arcot *et al.*<sup>450</sup> explain that ‘a more statutory regime would lead to a ‘box-ticking’ approach that would fail to allow for sound deviations from the rule and would not foster investors’ trust’<sup>451</sup>. Indeed, more than half of the non-financial companies of the FTSE350 fully followed all provisions of the Code at the end of 2004<sup>452</sup>. A survey conducted in 2007 shows that more companies had begun to comply with the Code in the areas not covered by the Cadbury Code (1992)<sup>453</sup>. The annual survey of Grant Thornton<sup>454</sup> reveals that, in 2010, 50% of FTSE350 companies claimed full compliance with the Code. Of the reminder, 80% complied with all but one or two of the Code’s 48 provisions. Of the most recent surveys, the Grant Thornton<sup>455</sup> survey shows that companies are continuing to respond in a positive manner to the provisions introduced in September 2012 (new corporate governance code). Compliance with the Code remains high, with – for the first time – over 90% of FTSE350 companies reporting that they were either complying with all, or all but one or two, of its provisions<sup>456</sup>.

Still, the question remains as to whether it is an enough percentage to protect

---

<sup>448</sup> FRC, ‘Feedback Statement (...)’ (n 446).

<sup>449</sup> The FRC received 74 responses to the consultations. Of these, 17 were from listed companies, 9 from investors, 10 from audit firms, and 22 from assorted representative bodies.

<sup>450</sup> Arcot, Bruno & Faure-Grimaud (n 31).

<sup>451</sup> See also Financial Reporting Council, ‘What Constitutes and Explanation under ‘Comply or Explain’? Report of Discussions Between Companies and Investors’ (London, February 2012) <[www.frc.org.uk/Our-Work/Publications/Corporate-Governance/What-constitutes-an-explanation-under-comply-or-ex.aspx](http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/What-constitutes-an-explanation-under-comply-or-ex.aspx)> accessed 15 September 2013.

<sup>452</sup> Arcot, Bruno & Faure-Grimaud (n 31).

<sup>453</sup> *ibid.*

<sup>454</sup> Financial Reporting Council, ‘Developments in Corporate Governance 2011. The Impact and Implementation of the UK Corporate Governance Code and Stewardship Codes’ (London, December 2011) <[www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-2011-The-impa.pdf](http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-2011-The-imp.pdf)> accessed 16 March 2014, referring to this survey.

<sup>455</sup> Financial Reporting Council, ‘Developments in Corporate Governance and Stewardship 2014’ (London, January 2015) <[www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-and-Stewardsh.pdf](http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-and-Stewardsh.pdf)> accessed 16 March 2014, referring to this survey.

<sup>456</sup> *ibid.*

companies/economies from sudden collapses like those in the period 2007-2010, when the largest and key for economies companies went bankrupt from, practically, day to day. The question is also what percentage of companies from outside of the FTSE350 comply with the Code provisions. Their overall impact on the economy performance is as significant as the largest companies.

## C. SHAREHOLDER VALUE

Another important issue, which, in this case, brings both corporate governance systems closer to each other, is the so-called 'enlightened shareholder value'. In this regard, the question remains as to whether enlightened shareholder value is not the same as stakeholder value<sup>457</sup> (see 'Hybrid Corporate Governance in South Africa' – 'The Stakeholder Inclusive Model' in chapter III), according to which a company is responsible and accountable to a wider set of actors beyond its owners (suppliers, customers, employees, government, local communities, etc) who are influenced by the behaviour and performance of a company (see section 'The Andreasson Definition of Hybrid Corporate Governance' in chapter III)<sup>458</sup>.

As I have already explained, the theory of shareholder value assumes that companies are an extension of their owners (the shareholders), for whose benefit they are obligated to provide goods or services to customers. Therefore, they are required to be accountable and responsible towards their owners<sup>459</sup>. This also means that those who are responsible for the governance of the company have no responsibility to anyone other than shareholders<sup>460</sup>.

The shareholder model is often replaced by the 'shareholder enlightened' model, according to which the board of directors should also have regard for the legitimate interests and expectations of non-shareholder stakeholders (see section 'Stakeholder Inclusive Model' in chapter III). As Loderer *et al.*<sup>461</sup> point out, '[n]o country (...), not even the apparently shareholder-friendly United States or United Kingdom, has a legal requirement that managers [should] act solely in shareholders' interests.' At the international level, pressures come from such organisations as the UN and the OECD, which promote values-based corporate practices concerning human rights, labour, and the environment<sup>462</sup>.

In the US, communities and state governments have become more aware that companies

---

<sup>457</sup> Adam in Albert Luthuli Centre, 'Interview Summary Report (...)' (n 203).

<sup>458</sup> Wieland (n 196); West (n 192).

<sup>459</sup> West, *ibid.*

<sup>460</sup> Reed (n 39).

<sup>461</sup> Claudio Loderer, Lukas Roth, Urs Waelchli and Petra Joerg, 'Shareholder Value: Principles, Declarations, and Actions' (2010) Financial Management 5.

<sup>462</sup> Ronald W. Clement, 'The Lessons from Stakeholder Theory for U.S. Business Leaders' (2005) 48 Business Horizons 255.



should have a long-term commitment to their investment in a particular locale. Too often, companies – probably for economic reasons – had abandoned the locale, leaving such problems as increased unemployment and an eroding tax base in the wake of their departure<sup>463</sup>. Many states have adopted statutes that give boards of directors the right to consider the interests of non-shareholder stakeholders<sup>464</sup>. More than 100,000 federal, state, and local rules and regulations on environmental protection have been issued<sup>465</sup>.

Luoma and Goodstein<sup>466</sup> observe that, compared to 20 years ago, corporations are much more likely to include such stakeholders as suppliers, customers, employees, and members of the public on their boards of directors.

Luoma and Goodstein<sup>467</sup> also indicate the size and complexity of today's modern companies as one of reasons why it became necessary to adopt shareholder enlightened value in the US. They enable large companies to become more visible '(...) and hence subject to greater attention from such constituencies as the state, the media, professional groups, and the general public.'<sup>468</sup>

The UK Parliament included the enlightened shareholder concept in the Companies of Act 2006. Accordingly, UK directors are now obliged to have regard (amongst other matters) to:

- a. 'the likely consequences of any decision in the long term,
- b. the interest of the company's employees'
- c. the need to foster the company's business relationships with suppliers, customers and others,
- d. the impact of the company's operations on the community and the environment,
- e. the desirability of the company maintaining a reputation for high standards of business conduct, and
- f. the need to act fairly as between members of the company.'<sup>469</sup>

The Act also requires listed companies to recognise and report on stakeholder matters as part of comprehensive disclosures to investors. Specifically, the mandatory director's report must contain a business review of the company's business and a description of the principal risks, and uncertainties facing the company<sup>470</sup>.

---

<sup>463</sup> *ibid.*

<sup>464</sup> Luoma & Goodstein (n 42).

<sup>465</sup> Berry & Rondinelli (n 41).

<sup>466</sup> Luoma & Goodstein (n 42).

<sup>467</sup> *ibid.*

<sup>468</sup> *ibid.*

<sup>469</sup> Section 172, Part 10, Chapter 2.

<sup>470</sup> Section 417, Part 15, Chapter 5.

According to the UK government, '(...) this approach (...) is most likely to drive long-term company performance and maximise overall competitiveness and wealth and welfare for all.'<sup>471</sup>

Indeed, various studies<sup>472</sup> have found a positive relationship between corporate social performance (CSP) and corporate financial performance (CFP). Roman *et al.*<sup>473</sup> (1999) reviewed 52 such studies and found 33 reporting a positive relationship between CSP and CFP, only 14 reporting a negative relationship, and five reporting no relationship. Frooman<sup>474</sup> (1997) found a relationship between CSP and CFP in his analysis of 27 'event' studies, which focused on the response of the stock market to a single important event (eg a product recall). In particular, he established '(...) that, for firms engaging in socially irresponsible and illicit behaviour, the effect on shareholder wealth is negative and substantial in size'<sup>475</sup>. Most recently, Verschoor and Murphy<sup>476</sup> (2002) found '(...) unbiased and rather conclusive empirical evidence that [companies] committed to social and environmental issues that are important to their stakeholders also have superior financial performance (...).'

## D. THE BOARD STRUCTURE

In light of considerations on the one-tier board system in Japan and the possibility of the implementation such a board in Poland, an issue that must be raised in this chapter is board structure in the US and the UK.

The common feature for both countries is the unitary character of the board of directors, which means one single board comprising either directors and officers (US), or executive and non-executive directors (UK). Directors in both countries are elected to the board at the company's annual general meeting, and are members of board committees (usually audit, remuneration and nomination committees). In the UK, they are often commanded by the chairman and the chief executive director. Whilst the chairman is responsible for the running of the board, the CEO is responsible for the running of the business. The American board of directors is responsible for

---

<sup>471</sup> Mallin (n 27) 76, who refers to the Department of Trade and Industry consultative Company Law Reform (2005) document which preceded the Companies Act of 2006.

<sup>472</sup> See Sandra A. Waddock and Samuel B. Graves, 'The Corporate Social Performance – Financial Performance Link' (1997) 18 (4) Strategic Management Journal 303, explaining that many of the earliest studies on this topic had used questionable measures not only of corporate response to stakeholders, but also of corporate financial performance.

<sup>473</sup> Ronald M. Roman, Sefa Hayibor and Bradley R. Agle, 'The Relationship Between Social and Financial Performance' (1999) 38 (1) Business & Society 109.

<sup>474</sup> Jeff Frooman, 'Socially Irresponsible and Illegal Behavior and Shareholder Wealth' (1997) 36 (3) Business & Society 221.

<sup>475</sup> *ibid.*

<sup>476</sup> Verschoor & Murphy (n 38).

monitoring the management of the company and an executing role is delegated to (executive) officers, usually elected by the board of directors<sup>477</sup>.

The board of directors leads and controls a company and hence an effective board is fundamental to the success of the company. The board is the link between managers and investors, and is essential to good corporate governance and investor relations.<sup>478</sup>

## **1. Chief executive officer vs chairman**

The separation of the roles of CEO and chairman has been broadly discussed in both countries. This issue is particularly important in view of the weak flow of information between the management and the supervisory boards in Poland (see section 'Other Board Issues in chapter V). Research proves that the absence of separation fosters this flow in countries that adhere to the one-tier board system<sup>479</sup>. Thus, this issue should be taken into account while choosing a one-tier board system for Polish companies.

In the UK system, it is desirable that the roles of CEO and chairman be split because there may otherwise be too much power vested in one individual. The UK Code of 2012 states that '[t]he roles of chairman and chief executive should not be exercised by the same individual'<sup>480</sup>. A similar requirement is not stated in the US equivalent of the UK Code, the Model Business Corporate Act (MBCA). On the other hand, the Commission on Public Trust and Private Enterprise (2003) recommends that careful thought should be given to the concept of separating these two roles<sup>481</sup>. As of February 2010, Securities Exchange Commission rules also require listed companies to disclose their board leadership structure, and explain why they have determined that such a leadership structure is appropriate, given their specific characteristics or circumstances<sup>482</sup>.

Interestingly, statistics from before 2010 reveal that the so-called duality (the corporate

---

<sup>477</sup> This is the traditional form of corporate governance in the US but it need not be the exclusive form. Patterns of management may also be tailored to specific needs in connection with family controlled enterprises, wholly or partially owned subsidiaries, or corporate joint ventures through a shareholder agreement under section 7.32 of the Model Business Corporate Act (MBCA). Under this section, an agreement among all shareholders can provide for a non-traditional form of corporate governance until the corporation becomes a public corporation as defined in section 1.40 (18A) MBCA.

<sup>478</sup> Mallin (n 27) 168.

<sup>479</sup> Thuy-Nga T. Vo, 'Rating Management Behavior and Ethics: A Proposal to Upgrade the Corporate Governance Rating Criteria' (2008) 34 Journal of Corporate Law 1.

<sup>480</sup> Para A.2.1.

<sup>481</sup> Mallin (n 27) 52.

<sup>482</sup> Matteo Tonello, 'Separation of Chair and CEO Roles' (The Harvard Law School Forum. Corporate Governance and Finance, 2011) <[www.blogs.law.harvard.edu/corpgov/2011/09/01/separation-of-chair-and-ceo-roles/](http://www.blogs.law.harvard.edu/corpgov/2011/09/01/separation-of-chair-and-ceo-roles/)> accessed 18 January 2014, in referring to these Securities Exchange Commission rules.

leadership structure where one individual holds both the CEO and chair positions<sup>483</sup>) has been a dominant occurrence in both countries, in particular in the US. Tonello<sup>484</sup>, for example, found that despite the larger numbers of separate chair positions in large American companies (7% of the S&P 500 in 2009 – 184 companies; a decrease from 39% in 2008 – 186 companies) only 81 companies of the S&P 500 (or 16% in total) had a ‘truly independent chair’. In the UK, this number was around 25%<sup>485</sup>.<sup>486</sup> More detailed statistics have been provided by Vo<sup>487</sup>.

A board Chair who is at the same time the Chief Executive Officer is likely to spend more time at the company, and therefore have more complete knowledge on the strengths and weaknesses of the company<sup>488</sup>. This reduces the cost of information transfer between company leaders, and improves the ability of the individual to carry out management duties, as information transfer might be costly, untimely or incomplete<sup>489</sup>.

On the other hand, a CEO who is at the same time a chairman might lack the scepticism necessary to scrutinise information that is screened and filtered by a CEO who does not hold the

---

<sup>483</sup> B. Ram Baliga, R. Charles Moyer and Ramesh S. Rao, ‘CEO Duality and Firm Performance: What’s the Fuss?’ (1996) 17 *Strategic Management Journal* 41 (‘In cases of CEO duality, the CEO of the firm wears two hats – the CEO hat and the chairperson of the board of directors hat. Non-duality implies that different individuals serve as the CEO and the chairperson.’); Brian K. Boyd, ‘CEO Duality and Firm Performance: A Contingency Model’ (1995) 16 *Strategic Management Journal* 301 (arguing that CEO duality exists when a company’s chief executive also serves as Chairman of the board of directors. Otherwise, the board is described as having an independent structure.); Wm. Gerard Sanders and Mason A. Carpenter, ‘Internationalization and Firm Governance: The Roles of CEO Compensation, Top Team Composition, and Board Structure’ (1998) 41 *Academic Management Journal* 158 (Duality means the situation in which an executive holds both the CEO and chairperson of the board positions.). A small number of scholars do not use the term ‘duality’ to specify the number of positions that the CEO holds, but instead use the term to refer to how many leaders the company has. Under that definition, a unitary leadership structure signifies that there is one individual serving as both CEO and Chair, and a dual leadership structure refers to two separate people serving as CEO and Chair. For details see James A. Brickley, Jeffrey L. Coles and Gregg Jarrell, ‘Leadership Structure: Separating the CEO and Chairman of the Board’ (1997) 3 *Journal of Corporate Finance* 189.

<sup>484</sup> Tonello (n 482).

<sup>485</sup> *ibid*; see also Richard W. Stevenson, ‘Balancing the Power at the Corporate Top, British Style’, *New York Times* (15 November 1992) (reporting that only 24% of public companies in Britain have duality and that the practice of having an independent director is common in Britain).

<sup>486</sup> See also Dan R. Dalton and Idalene F. Kesner, ‘Composition and CEO Duality in Boards of Directors: An International Perspective’ (1987) 18 *International Law Business Studies* 33 (finding that duality is the governance structure for 82% of large companies in the United States, 30% of large companies in the United Kingdom, and 10.9% of large companies in Japan). The duality is less popular – or even prohibited – in other countries; see, for example, Millstein Center for Corporate Governance and Performance, ‘Chairing the Board: The Case for Independent Leadership in Corporate North America’ (2009) <[www.cii.org/UserFiles/file/Millstein%20Center%20Rpt%20-%20Chairing%20the%20Board%203-15-09.pdf](http://www.cii.org/UserFiles/file/Millstein%20Center%20Rpt%20-%20Chairing%20the%20Board%203-15-09.pdf)> accessed 19 December 2014, explaining that Germany and Holland’s requirement of a two-tier board structure by definition separates the CEO and Chair positions, and South Africa’s Johannesburg Stock Exchange requires listed companies to split the positions. See also Sanders and Carpenter (n 483), noting that some countries’ regulation of board structure results in the lack of consolidation of the CEO and Chair positions.

<sup>487</sup> Thuy-Nga T. Vo, ‘To Be or Not to Be Both CEO and Board Chair’ (2010) 76 *Brooklyn Law Review* (2010) 65.

<sup>488</sup> Robert Charles Clark, ‘Corporate Governance Changes in the Wake of the Sarbanes Oxley Act: A Morality Tale for Policymakers Too’ (2005) 22 *Georgia State University Law Review* 251.

<sup>489</sup> Dawn Harris and Constance E. Helfat, ‘CEO Duality, Succession, Capabilities and Agency Theory: Commentary and Research Agenda’ (1998) 19 *Strategic Management Journal* 901.

position of Chair prior to that information being provided to the board<sup>490</sup>. Moreover, the information costs of splitting those two positions can be lessened by appointing non-executive Chairs with large experience and extensive knowledge, based on their long-time membership on the company's board<sup>491</sup>. There might also be an unwritten policy in a company that all communication of information from inside the company to the directors must first be approved by the CEO, which might produce information costs<sup>492</sup>.

Another expansive argument supporting duality is that a CEO-Chair can apply greater authority and speed in making and executing critical decisions for the company<sup>493</sup>. As a consequence, decisions made by a chief executive who is also the chairman of the company might be clearer, timelier, and more consistent than decisions made by a chief executive who has to negotiate and consult with a board that is directed by a separate chairman<sup>494</sup>. There is, however, an opinion that those two leadership position vested in one person might restrict board adoption of appropriate strategies that adapt to changing business environments<sup>495</sup>. Boyd<sup>496</sup>, for example, explains that duality has been blamed for poor performance and slow response to change in firms such as General Motors, Digital Equipment Corporation, and Goodyear Tire and Rubber. Vo<sup>497</sup> clarifies the view as follows: 'What appear to be clear and consistent decisions on the part of the CEO-Chair may turn out to be manifestations of the executive's fixation on a set course of action or unwillingness to adopt new business strategies to meet pressing competitive conditions.'

Some researchers<sup>498</sup> also argue that a combined CEO-Chair in US companies may enhance the board's performance of its management responsibilities by facilitating collaboration between board directors and company executives:

'The CEO is the leader of the company's executive group, and several members of that executive group are also likely to serve as directors on the board. Where the CEO is also the leader of the board of directors, the joint leadership may prompt more cooperation between the two groups. By enhancing collegiality and collaboration between board directors and

---

<sup>490</sup> Vo, 'Rating Management Behavior and Ethics (...)' (n 479).

<sup>491</sup> Brickley *et al.* (n 483).

<sup>492</sup> R. William Ide, 'Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight' (2003) 54 Mercer Law Review 829.

<sup>493</sup> Baliga *et al.* (n 483).

<sup>494</sup> *ibid.*

<sup>495</sup> *ibid.*

<sup>496</sup> Boyd (n 483).

<sup>497</sup> Vo, 'To Be or Not to Be (...)' (n 487).

<sup>498</sup> Clark (n 488); Steven Balsam, John Puthenpurackal and Arun Upadhyay, 'The Determinants and Performance Impact of Outside Board Leadership' <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1361255](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1361255)> accessed 28 May 2014; Ira M. Millstein and Paul W. MacAvoy, 'The Active Board of Directors and Performance of the Large Publicly Traded Corporation' (1998) 98 Columbia Law Review 1283.

company executives, a CEO-Chair may thus facilitate consensus that leads to smooth and efficient decision making.<sup>499</sup>

Yet, separation of the CEO and chairman roles also enhances the board's performance of its management responsibilities by improving both the quality and the appropriateness of board decision making<sup>500</sup>. Clark's<sup>501</sup> survey proves that a board Chair who is not an executive of the company may provide unique perspectives that encourage the board to discuss and make strategic and fundamental business decisions.

A non-executive Chair might also facilitate the board's management function by enabling the board to speedily make decisions and adopt new strategies to meet changing business environments<sup>502</sup>. A good example is Compaq Computer, where having a separate Chair enabled the company – over the strong objection of the company's CEO – to adopt a lower-priced product line to remain competitive in the industry<sup>503</sup>.

Finally, supporters of splitting the CEO-Chair position argue that the board performs its monitoring role better when there is a non-executive chairman. The monitoring role requires directors to keep an eye on corporate managers in order to detect and punish managerial incompetence and wrongdoing.<sup>504</sup> Thus, duality might cause failure by the board to effectively monitor and control executive management.

## 2. The independence of non-executive directors

Objectivity in board decisions is an issue to which considerable attention is paid in the Anglo-Saxon models of corporate governance. In particular, great emphasis is put on the issue of directors' independence, which is also important from the perspective of research on Polish corporate governance. In chapter III (see section 'Hybrid Corporate Governance in Poland'), I refer to Oplustil and Radawan's<sup>505</sup> opinion, according to which, imposing on companies the obligation to appoint

---

<sup>499</sup> Vo, 'To Be or Not to be (...)' (n 487).

<sup>500</sup> Baliga *et al.* (n 483).

<sup>501</sup> Clark (n 488); Sanders & Carpenter (n 483).

<sup>502</sup> Baliga *et al.* (n 483).

<sup>503</sup> *ibid.* See also the case of Cypress Semiconductor Corporation; Christopher Caggiano, 'Call Grows for Separation of CEO and Chairman Roles' (2004) 231 New Jersey Law Journal 5.

<sup>504</sup> Baliga *et al.* (n 483); Katherine M. Brown, 'New Demands, Better Boards: Rethinking Director Compensation in an Era of Heightened Corporate Governance' (2007) 82 New York University Law Review 1102; Sydney Finkelstein and Richard A. D'Aveni, 'CEO Duality as a Double-Edged Sword: How Boards of Directors Balance Entrenchment Avoidance and Unity of Command' (1994) 37 Academy of Management Journal 1079.

<sup>505</sup> Oplustil & Radwan (n 7) 490.

the majority of independent supervisors in 2002 was an attempt to transplant the Anglo-Saxon concept of independent directors in Poland. In chapters V-VI, I develop the issue of supervisors' independence in Poland. In particular, I explain the meaning that it has for the higher protection of minority shareholders in Polish companies with a highly consolidated ownership structure.

In the UK, the idea of independence has been emphasised again and again in various official documents for the last 20 years. The Cadbury Code<sup>506</sup> (1992) first recommended that non-executive directors '(...) should be independent of management and free from any business or other relationship which could materially interfere with the exercise of their independent judgement.' The idea was then reinforced by the Higgs Review<sup>507</sup> (2003), according to which nonexecutive directors '(...) bring a dispassionate objectivity that directors with a closer relationship to the company cannot provide.'

According to the American MBCA<sup>508</sup>, '(...) [i]n the case of a public corporation, the board's oversight responsibilities include attention to: [amongst others] (...) the composition of the board and its committees, taking into account the important role of independent directors.'

At the international level, in 1999, the OCED<sup>509</sup> announced the following: 'Board independence usually requires that a sufficient number of board members not be employed by the company and not be closely related to the company or its management through significant economic, family or other ties. This does not prevent shareholders from being board members.' Afterwards, the OCED<sup>510</sup> (2004) stated that 'board independence (...) usually requires that a sufficient number of board members will need to be independent of management.'

In the UK, '[t]he board should include an appropriate combination of executive and non-executive directors (and, in particular, independent non-executive directors) such that no individual or small group of individuals can dominate the board's decision taking'<sup>511</sup>. The Company Code 2012<sup>512</sup> also requires the board to:

- identify in the annual report each non-executive director it considers to be independent; determine whether the executive director it considers to be independent;

---

<sup>506</sup> Para. 4.12.

<sup>507</sup> Para. 9.5.

<sup>508</sup> Chapter 8. Directors and Officers – Subsection A. Board of Directors – Section 8.01 (c) (viii); see also Conference Board, 'The Conference Board Commission on Public Trust and Private Enterprise' (2003) <[www.conference-board.org/pdf\\_free/SR-03-04-ES.pdf](http://www.conference-board.org/pdf_free/SR-03-04-ES.pdf)> accessed 29 December 2014; New York Stock Exchange, 'Final New York Stock Exchange Corporate Governance Rules' (4 November 2003) <[www.nyse.com/pdfs/finalcorpgovrules.pdf](http://www.nyse.com/pdfs/finalcorpgovrules.pdf)> accessed 29 December 2014; National Association of Corporate Directors, 'Key Agreed Principles to Strengthen Corporate Governance for US Publicly Traded Companies' (2008); New York Stock Exchange, 'Report of the New York Stock Exchange Commission on Corporate Governance' (23 September 2010) <[www.nyse.com/pdfs/CCGReport.pdf](http://www.nyse.com/pdfs/CCGReport.pdf)> accessed 14 January 2014.

<sup>509</sup> Mallin (n 27) 180.

<sup>510</sup> *ibid.*

<sup>511</sup> Para B.1.

<sup>512</sup> Para. B.1.1.

- determine whether the director is independent in character and judgement and whether there are relationships or circumstances which are likely to affect, or could appear to affect, the director's judgement.

Independence is generally defined as a state when there are no relationships or circumstances that might affect the director's judgement<sup>513</sup>. The Code 2012<sup>514</sup> states the following:

'The board should state its reasons if it determines that a director is independent notwithstanding the existence of relationships or circumstances which may appear relevant to its determination, including if the director:

- has been an employee of the company or group within the last five years;
- has, or has had within the last three years, a material business relationship with the company either directly, or as a partner, shareholder, director or senior employee of a body that has such a relationship with the company;
- has received or receives additional remuneration from the company apart from a director's fee, participates in the company's share option or a performance-related pay scheme, or is a member of the company's pension scheme;
- has close family ties with any of the company's advisers, directors or senior employees;
- holds cross-directorships or has significant links with other directors through involvement in other companies or bodies;
- represents a significant shareholder; or
- has served on the board for more than nine years from the date of their first election.'

These are, thus, situations where a non-executive director's independence would be called into question.

In American *Official Comment to Section 8.01*<sup>515</sup>, we can read that the listing standards of most public securities markets have requirements for independent directors to serve on boards. In many cases, they must constitute a majority of the board, and certain board committees must be composed entirely of independent directors. The listing standards have differing rules as to what constitutes an independent director. The Act<sup>516</sup> does not provide a definition of an 'independent director', but according to a commentary attached to it:

---

<sup>513</sup> Mallin (n 27) 180.

<sup>514</sup> Para. B.1.1.

<sup>515</sup> Model Business Corporate Act (MBCA) – text to n 508.

<sup>516</sup> Text to n 477.



‘[o]rdinarily an independent director may not be a present or recent member of senior management. Also, to be considered independent, the individual usually must be free of significant professional, financial or similar relationships – and the director and members of the director’s immediate family must be free of similar relationships with the corporation’s senior management.’

Judgment is required to determine independence in light of the particular circumstances, subject to any specific requirements of a listing standard. The attitude of disinterestedness required of directors under the Act<sup>517</sup> for specific purposes are similar but not necessarily identical.

There is some discussion as to whether the number of non-executive directorships that any one individual can hold should be defined. Mallin<sup>518</sup> explains the problem as follows:

‘Of course, if an individual were to hold many non-executive directorships, for example ten or more, then it is arguable whether that individual could devote enough time and consideration to each of the directorships. On the other hand, it may be perfectly feasible for an individual to hold, for example, five non-executive directorships. It really depends on the time that an individual has available, on the level of commitment, and whether any of the multiple non-executive directorships might lead to the problem of interlocking directorships whereby the independence of their role is compromised. An interlocking might occur through any of a number of circumstances, including family relationship, business relationship, or a previous advisory role (such as auditor), which would endanger the fundamental aspect of independence.’

Mallin<sup>519</sup> notes that, in the UK, the independence of non-executive directors is usually carefully screened by institutional investors and their representative groups, and that disclosure of biographical information and growing use of databases of director information help shareholders to notice probable problems in the area. In addition, ‘non-executive directors should undertake that they will have sufficient time to meet what is expected of them’ and ‘their other significant commitments should be disclosed to the board before appointment, with a board indication of the time involved and the board should be informed of subsequent changes’<sup>520</sup>. It is recommended that

---

<sup>517</sup> *ibid.*

<sup>518</sup> Mallin (n 27) 180-181.

<sup>519</sup> *ibid* 181.

<sup>520</sup> Para. B.3.2

a full-time executive director should not take on ‘more than one non-executive directorship in a FTSE 100 company nor the chairmanship of such a company’<sup>521</sup>.

In chapter III, I draw attention to differentiating outcomes of surveys concerning the influence of directors’ independence on company performance in Japan. Surveys conducted in the US and the UK produced similar outcomes. For example, Agrawal and Knoeber (1996) show that outside directors are associated with poorer performance<sup>522</sup>. Similar results are reported in Shivdasani and Yermack (1999) and Klein (1998)<sup>523</sup>. Bhagat and Black (2002) do not find any relationship between the presence of independent directors on the board and company’s performance<sup>524</sup>. On the other hand, Weisbach (1988) finds that boards with a higher proportion of outside directors are more likely to replace a CEO in cases of poor corporate performance<sup>525</sup>. A positive relationship between board independence and firm performance is reported in Rosenstein and Wyatt<sup>526</sup> (1990) and Andres and Vallelado<sup>527</sup> (2008). Yeh *et al.*<sup>528</sup> (2011), using the data of the 20 largest financial institutions from G8 countries (Australia, Canada, France, Germany, Italy, Japan, UK and US), of which four are common law countries and four civil law countries, find that:

‘[the] performance during the crisis period is higher for financial institutions with more independent directors on auditing and risk committees. The influence of committee independence on the performance is particularly stronger for civil law countries. In addition, the independence-performance relationships are more significant in financial institutions with excessive risk-taking behaviours.’

---

<sup>521</sup> Para. B.3.3.

<sup>522</sup> Charlie Weir, Oleksandr Talavera and Alexander Muravyer, ‘The Return on Human Capital: The Case of UK Non-Executive Directors that are also Executive Directors’ <[www.uea.ac.uk/documents/953219/967353/UEA-AFE-029.pdf/013212d5-d252-4d1a-868c-12ec67764092](http://www.uea.ac.uk/documents/953219/967353/UEA-AFE-029.pdf/013212d5-d252-4d1a-868c-12ec67764092)> accessed 17 March 2014; see also Roberto Mura, ‘Firm Performance: Do Non-Executive Directors Have Minds of their Own? Evidence from UK’ (2007) 36 (3) *Financial Management* 81.

<sup>523</sup> *ibid.*

<sup>524</sup> *ibid.*

<sup>525</sup> *ibid.*

<sup>526</sup> Stuart Rosenstein and Jeffrey G. Wyatt, ‘Outside Directors, Board Independence and Shareholder Wealth’ (1990) 26 *Journal of Financial Economics* 175.

<sup>527</sup> Pablo de Andres and Eleuterio Vallelado, ‘Corporate Governance in Banking: The Role of the Board of Directors’ (2008) 32 (12) *Journal of Banking and Finance* 2570.

<sup>528</sup> Yin-Hua Yeh, Huimin Chung and Chih-Liang Liu, ‘Committee Independence and Financial Institution Performance during the 2007-08 Credit Crunch: Evidence from a Multi-Country Study’ (2011) 19 (5) *Corporate Governance: An International Review* 437.

### 3. Board diversity

Another issue that should be mentioned in the section 'The Board Structure' is diversity amongst board members. As the issue was raised by two of my research participants<sup>529</sup> during interviews, I decided to include it with chapters V and VI, and briefly present the American and British approach to it.

As I have written in the previous subsection, typically, state and federal laws in the United States define directors' independence as the absence of a significant financial interest or familial tie between a board member and the company or between a board member and the firm's senior executives. However, as Colaco *et al.*<sup>530</sup> declare, this definition of independence may not be enough 'to create boards that are truly independent of management', as:

'(...) a well-developed stream of social network research on the origins and effects of interlocking directorates, where individual directors sit on each other's boards, and on back door ties between directors, where individual directors serve on two or more boards which have overlapping sets of directors, suggests that such a purely economic definition of independence may not be adequate to create boards that are truly independent of management (...). Social relationships with senior executives and other directors can be antithetical to independence and thus impede the ability of directors to provide effective oversight.'

Rodrigues<sup>531</sup> suggests that to promote independent oversight, companies should look beyond the 'narrow' economic view of independence in electing board members. He states that an essential 'precursor to independence of thought' is diversity, and advises that increasing the amount of heterogeneity among board members would have a positive impact on the quality of board oversight. This idea is sustained by Dallas<sup>532</sup>, who claims that people with diverse backgrounds have alternative viewpoints and thus may be more likely to express dissenting opinions.

A way to achieve more heterogeneous and independent boards is to seek out more women for board positions. Nevertheless, despite the fact that the proportion of women in leadership roles

---

<sup>529</sup> A minority shareholder of a JSC; interviewed in July 2012; a president of the management board of a JSC, interviewed between August and September 2012.

<sup>530</sup> Hugh M J Colaco, Paul Myers and Mindell Reiss Nitkin, 'Pathways to Leadership: Board Independence, Diversity and the Emerging Pipeline in the United States for Women Directors' (2011) 8 *International Journal of Disclosure and Governance* 122.

<sup>531</sup> Usha Rodrigues, 'The Fetishization of Independence' (2008) 33 (1) *Journal of Corporate Law* 447.

<sup>532</sup> Lynne L. Dallas, 'The New Managerialism and Diversity on Corporate Boards (2002) 76 *Tulane Law Review* 1363.

is growing, women are still far behind men in board elections.<sup>533</sup> Colaco *et al.*<sup>534</sup> report that only 13% of board members on Fortune 1000 companies are women. Erhardt *et al.*<sup>535</sup> and Carter *et al.*<sup>536</sup> present analogous outcomes.

In the UK, in May 2011, the FRC began consulting on potential changes to the Corporate Governance Code 'that would require companies to publish their policy on boardroom diversity and report it annually, as recommended by the Davis Report<sup>537</sup> (2011) and to consider the board's diversity amongst other factors, when assessing its effectiveness'<sup>538</sup>. In October 2011, the FRC said that these amendments would be implemented in a reviewed version of the Code, which will apply to financial years beginning on or after 1 October 2012.

The changes affect two sections of the Code. With respect to Section B.2.4, where it is proposed that 'the work of the nomination committee should be described in a separate section of the annual report, including the process used in relation to board appointments. This section should contain a description of 'the board's policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives. An explanation should be given if neither an external search consultancy nor open advertising has been used in the appointment of a chairman or a non-executive director.' Moreover, in relation to Section B6 where 'the evaluation of the board should consider the balance of skills, experience, independence and knowledge of the company on the board, its diversity, including gender, how the board works together as a unit, and other factors relevant to its effectiveness.'

In the middle of 2011, the European Parliament called on EU states to reserve 30% of seats on boards for women until 2015, 40% until 2020<sup>539</sup>. Furthermore, the European Commission is considering legislation to improve the gender balance on the boards of listed companies<sup>540</sup>.

A number of countries in the EU – France, the Netherlands, Italy and Belgium – enacted legislative measures in 2011 aimed to improve gender balance in company boards, and that other countries (eg Spain since 2007 and Norway since 2003) already had quota systems in place at

---

<sup>533</sup> Colaco *et al.* (n 530).

<sup>534</sup> *ibid.*

<sup>535</sup> Niclas L. Erhardt, James D. Werbel and Charles B. Shrader, 'Board of Director Diversity and Firm Financial Performance' (2003) 11 (2) *Corporate Governance: An International Review* 102.

<sup>536</sup> David A. Carter, Betty J. Simkins and W. Gary Simpson, 'Corporate Governance, Board Diversity, and Firm Value' (2003) 38 (1) *Financial Review* 33.

<sup>537</sup> This report is available on <[www.gov.uk/government/news/women-on-boards](http://www.gov.uk/government/news/women-on-boards)> accessed 18 March 2013.

<sup>538</sup> Mallin (n 27) 185.

<sup>539</sup> PricewaterhouseCoopers, 'Rady Nadzorcze 2013. Skuteczność Rad Nadzorczych w Spółkach Publicznych Notowanych na GPW' (2012) <[www.pwc.pl/pl\\_PL/pl/publikacje/pwc\\_rady\\_nadzorcze\\_2013.pdf](http://www.pwc.pl/pl_PL/pl/publikacje/pwc_rady_nadzorcze_2013.pdf)> accessed 26 May 2014.

<sup>540</sup> European Commission, 'Gender Balance in Decision-Making Positions' (27 June 2014) <[www.ec.europa.eu/justice/gender-equality/gender-decision-making/index\\_en.htm](http://www.ec.europa.eu/justice/gender-equality/gender-decision-making/index_en.htm)> accessed 25 May 2014.

40%<sup>541</sup>.

Still, the Parliament's recommendation seems to be a real challenge when looking at companies listed on the London Stock Exchange, where the participation of women in FTSE 100 companies amounts to 15%, and in FTSE 350 companies – 9%<sup>542</sup>.

In January 2012, the average number of female board members in the largest companies listed in the EU was only 13.7% compared to 11.8% in 2010. Moreover, only 3.2% of chairpersons were women in January 2012 compared to 3.4% in 2010.<sup>543</sup>

What does the academic evidence have to say about board diversity? Erkut *et al.*<sup>544</sup> report that a critical mass of three or more women directors can fundamentally change the boardroom and improve corporate governance. The programme of boardroom discussion is more likely to concern the perspectives of multiple stakeholders; challenging issues and problems are less likely to be ignored or brushed aside; and boardroom dynamics are more open and cooperative. Erkut *et al.*<sup>545</sup> based their research on interviews with 50 women directors, twelve CEOs, and seven corporate secretaries from Fortune 1000 companies.

Carter *et al.*<sup>546</sup> examined both the diversity of the board and of important board committees in all companies listed on the Fortune 500 over the period 1998-2002. Their results sustain the opinion that board diversity has a positive impact on financial performance. The evidence on board committees shows that gender diversity is positive for financial performance principally through the audit function of the board while ethnic diversity influences financial performance through all three functions of the board, namely audit, executive compensation, and director nomination.

Grosvold and Brammer<sup>547</sup> report that 'as much as half the variation in the presence of women on corporate boards across countries is attributable to national institutional systems and that culturally and legally-orientated institutional systems appear to play the most significant role in shaping board diversity.'

Ferreira<sup>548</sup> analyses the possible costs and benefits of board diversity that can be inferred

---

<sup>541</sup> European Commission, 'Women in Economic Decision-Making in the EU: Progress Report. A Europe 2020 Initiative' (European Union, 2012) <[www.ec.europa.eu/justice/gender-equality/files/women-on-boards\\_en.pdf](http://www.ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf)> accessed 28 June 2014.

<sup>542</sup> PwC, 'Rady Nadzorcze 2013. Skuteczność (...)' (n 539).

<sup>543</sup> Mallin (n 27) 186.

<sup>544</sup> Sumru Erkut, Vicki W. Kramer and Alison M. Konrad, 'Critical Mass: Does the Number of Women on a Corporate Board Make a Difference?' in Susan Vinnicombe, Val Singh, Ronald J. Burke, Diana Bilimoria and Morten Huse (eds), *Women on Corporate Boards of Directors: International Research and Practice* (Edward Elgar 2008).

<sup>545</sup> *ibid.*

<sup>546</sup> Carter *et al.* (n 536). See also Appendix 9.

<sup>547</sup> Johanne Grosvold and Stephen Brammer, 'National Institutional Systems as Antecedents of Female Board Representation: An Empirical Study' (2011) 19 (2) *Corporate Governance: An International Review* 116.

<sup>548</sup> Daniel Ferreira, 'Board Diversity' in H. Kent Baker and Ronald Anderson (eds), *Corporate Governance, A Synthesis of Theory, Research and Practice* (The Robert W. Kolb Series in Finance, John Wiley & Sons Inc. 2011).

from the academic literature. Among the costs are conflict, lack of co-operation, and insufficient communication; choosing directors with little experience, inadequate qualifications, or who are overused; and conflicts of interests and agenda pushing. The benefits include creativity and different perspectives; access to resources and connections; career incentives through signalling and mentoring; and public relations, investor relations and legitimacy. From his analysis of board diversity literature, he comes to the conclusion that 'making a business case for women in the boardroom on the basis of statistical evidence linking women to profits obviously creates possibility of a business case against women if the evidence turns out to suggest that women reduce profits (...) the research on board diversity is best used as a means to understand the costs and benefits of diversity in the workplace and to study corporate governance issues.'

## E. DIRECTORS' PERFORMANCE AND REMUNERATIONS

The issue of directors' performance and remuneration has been hotly debated on both sides of the Atlantic. It is not directly associated with the issue of corporate hybridisation, on which I elaborate in chapter III, but it has a strong link with my further discussion on corporate governance in Poland. My research participants during interviews (see chapter VI) found the relationship between directors' performance and remuneration, as well as the disclosure of remuneration, one of the most serious weaknesses of Polish corporate governance (first research question; see chapter I), and therefore it was only natural to include this issue with the chapter on American and British corporate governance.

The directors' remuneration debate clearly refers to the principal-agent concept. In this regard, Conyon and Mallin<sup>549</sup> explain that 'shareholders are viewed as the 'principal' and managers as their 'agents', and that the economics literature, in particular, demonstrates that the compensation received by senior management should be linked to company performance for incentive reasons.' Meanwhile, in research published in 2004, Bebchuk and Fried<sup>550</sup> observed that the pay level for directors in the UK tends to increase, despite the bad performance of the company in question, and this dilutes and distorts managers' incentives, and hurts the shareholders.

The 2011 UK Department for Business, Innovation & Skills<sup>551</sup> paper on executive

---

<sup>549</sup> Martin J. Conyon and Christine Mallin, *Directors' Share Options, Performance Criteria and Disclosure Compliance with the Greenbury Report* (ICAEW Research Board, London 1997).

<sup>550</sup> Lucian Bebchuk and Jesse Fried, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation* (Harvard University Press 2004).

<sup>551</sup> Department for Business, Innovation & Skills, 'Executive Remuneration: Discussion Paper' (September 2011) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31660/11-1287-executive-remuneration-discussion-paper.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31660/11-1287-executive-remuneration-discussion-paper.pdf)> accessed 16 December 2013.

remuneration highlights the increasing disparity between the pay of CEOs and employees in the largest companies, and cites evidence to suggest that executive pay (in particular at CEO level in FTSE 100 companies) is not strongly related to company performance or shareholder returns.

The most recent crises highlighted the inequalities that exist between executive directors' generous remuneration and the underperformance of the company that they direct. They also revealed consequences that might arise from badly designed compensation contracts. Shareholders lost vast sums of money, sometimes their life savings, and employees found themselves on shorter working weeks, lower incomes, or being made redundant.

The International Labour Organization<sup>552</sup> reports the following:

'the gap in income inequality is also widening – at an increasing pace – between top executives and the average employee. For example, in the United States in 2007, the chief executive officers (CEOs) of the 15 largest companies earned 520 times more than the average worker. This is up from 360 times more in 2003. Similar patterns, though from lower levels of executive pay, have been registered in Australia, Germany, Hong Kong (China), the Netherlands and South Africa.'

The High Pay Commission<sup>553</sup> – an independent inquiry into high pay and boardroom pay across the public and private sectors in the UK – observes: 'In BP, in 2011 the lead executive earned 63 times the amount of the average employee. In 1979 the multiple was 16.5 In Barclays, top pay is now 75 times that of the average worker. In 1979 it was 14.5. Over that period, the lead executive's pay in Barclays has risen by 4,899.4% - from £87,323 to a staggering of £4,365,636.'

In the context of the global banking crisis, the House of Commons Treasury Committee<sup>554</sup> reported in May 2009 that (among other things) bonus-driven remuneration structures in the City of London, as well as in other financial centres (especially in investment banking), led to reckless and excessive risk taking. On top of that, in too many cases the bonus schemes in the banking sector were not aligned with the interest of shareholders and the long-term sustainability of the banks<sup>555</sup>.

---

<sup>552</sup> International Labour Organization, 'World of Work 2008: Income Inequalities in the Age of Financial Globalization (International Institute for Labour Studies, Geneva 2008) <[www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_099413.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_099413.pdf)> accessed 15 January 2014.

<sup>553</sup> High Pay Commission, 'Cheques with Balances: Why tackling high pay is in the national interest' <[www.highpaycentre.org/files/Cheques\\_with\\_Balances.pdf](http://www.highpaycentre.org/files/Cheques_with_Balances.pdf)> accessed 27 April 2014.

<sup>554</sup> House of Commons Treasury Committee, 'Banking Crisis: reforming corporate governance and pay in the city' (12 May 2009) <[www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/519/519.pdf](http://www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/519/519.pdf)> accessed 14 November 2013.

<sup>555</sup> *ibid.*

According to the High Pay Commission's<sup>556</sup> report, published in 2011, alongside an average increase in FTSE 350 salaries of 63.9% between 2002 and 2010, average bonuses increased from 48% to 90% of salary in the same period.

Comparing company performance to stock and balance sheet performance, the same report<sup>557</sup> suggests that 'salary growth bears no relation to either market capitalisation, earnings per share (EPS) or pre-tax profit' and that 'there is no or little relation between the total earnings trends and market capitalisation.'

In 2010, the High Pay Commission<sup>558</sup> found 'evidence that excessive high pay damages companies, is bad for (...) economy and has negative impacts on society as a whole. At its worst, excessive pay bears little relation to company success and is rewarding failure.' Four causes of the dramatic growth in top pay were found: attempts to link pay to performance, company structures fail to exert proper control over top earnings, the labour market contributes to increasing pay at the top, and the rise in individualism<sup>559</sup>.

The ILO<sup>560</sup> states that developments in corporate governance significantly contributed to excessive income inequality, in particular the use of so-called 'performance pay systems' for chief executive managers and directors. Meanwhile, empirical research proves that there is little relationship between these systems and company performance. Furthermore, some countries show practically no relationship between performance-pay and company returns. Altogether, 'evidence suggests that developments in executive pay may have been both inequality-enhancing and economically inefficient'<sup>561</sup>.

## F. THE DISCLOSURE OF DIRECTORS' REMUNERATION

In order to improve the relationship between directors' performance and their remuneration, several legislative initiatives have been undertaken in the US and the UK. In this respect, the Greenbury Report (1995) and the Turnbull Committee recommendations (1999, revised in 2005)

---

<sup>556</sup> High Pay Commission, 'What are we paying for? Exploring executive pay and performance' <[www.mbsportal.bl.uk/secure/subjareas/accfinecon/highpaycommission/126842whatarewepayingfor11.pdf](http://www.mbsportal.bl.uk/secure/subjareas/accfinecon/highpaycommission/126842whatarewepayingfor11.pdf)> accessed 28 January 2013.

<sup>557</sup> *ibid.*

<sup>558</sup> High Pay Commission, 'More for Less: what has happened to pay at the top and does it matter?' (May 2011) <[www.highpaycentre.org/img/High\\_Pay\\_Commission\\_More\\_for\\_Less.pdf](http://www.highpaycentre.org/img/High_Pay_Commission_More_for_Less.pdf)> 29 January 2014.

<sup>559</sup> *ibid.*

<sup>560</sup> International Labour Organisation (n 552).

<sup>561</sup> *ibid.*



have had the most significant influence on them<sup>562</sup>.

The Greenbury Report aimed mainly to strengthen the accountability of and enhance the performance of directors<sup>563</sup>. This was to be achieved by (1) establishing remuneration committees composed of independent non-executive directors, who would report about the company's executive remuneration policy fully to the shareholders each year; and (2) adopting performance measures, which would link rewards to the performance of both the company and individual directors, so that the interests of directors and shareholders were more closely aligned<sup>564</sup>.

Among other things, the Turnbull Committee recommended 'that boards should consider whether business objectives and the risk management/control systems of a business are supported by the performance-related reward system in operation in a company'<sup>565</sup>. As part of the accountability/transparency process, the remuneration committee membership should be disclosed in the company's annual report, and the chairman of the remuneration committee should attend the company's annual general meeting to answer any questions that shareholders may have about the directors' remuneration<sup>566</sup>.

The result of the Greenbury and Turnbull recommendations is the publication, by the Department of Transport & Industry, of the Directors' Remuneration Report Regulations 2002<sup>567</sup>. This regulation requires, *inter alia*, that:

- quoted companies must publish a detailed report on director's pay as part of their annual reporting cycle, and this report must be approved by the board of directors;
- a graph of the company's total shareholder returns over five years, against a comparator group, must be published in the remuneration committee report;
- the names of any consultants to the remuneration committee must be disclosed, including whether they were appointed independently, along with the cost of any other services provided to the company;
- companies must hold a shareholder vote on the directors' remuneration report at each general meeting.

It should, however, be emphasised that this is only an advisory shareholder vote. Still, it should serve a useful purpose of ensuring that the shareholders can vote specifically on directors'

---

<sup>562</sup> Mallin (n 27) 210.

<sup>563</sup> Richard Greenbury, 'Directors' Remuneration. Report of a Study Group Chaired by Richard Greenbury' (17 July 1995) <[www.ecgi.org/codes/documents/greenbury.pdf](http://www.ecgi.org/codes/documents/greenbury.pdf)> accessed 28 January 2014; see also Mallin (27) 210.

<sup>564</sup> *ibid*.

<sup>565</sup> Financial Reporting Council, 'Internal control: Revised guide for directors on the Combined Code' (October 2005) <[www.ecgi.org/codes/documents/frc\\_ic.pdf](http://www.ecgi.org/codes/documents/frc_ic.pdf)> accessed 7 February 2014; see also Mallin (27) 210.

<sup>566</sup> *ibid*.

<sup>567</sup> This report is available on <[www.legislation.gov.uk/uksi/2002/1986/contents/made](http://www.legislation.gov.uk/uksi/2002/1986/contents/made)> accessed 20 March 2013.

remuneration<sup>568</sup>. The other provisions might help to 'strengthen the role of the remuneration committee and enhance both the accountability and transparency of the directors' remuneration-setting process'<sup>569</sup>.

With respect to 'say on pay', the US Congress took it one step further, and decided in the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010) to make it obligatory for US companies. Accordingly, the Act requires a shareholder advisory vote for approving a company's executive compensation to take place at least once every three years. The 'say on frequency' provision requires companies to hold a shareholder advisory vote every six years on whether the 'say on pay' resolution should occur every one, two, or three years.

On the other hand, Conyon and Sadler<sup>570</sup> (2010), in a study of shareholder voting behaviour in the UK from 2002- 2007, find that there is 'little evidence of widespread and deep shareholder voting against CEO pay'. Both authors admit that their study was carried out on pre-financial crisis data and that there might be a higher opposition on the shareholders' part after the crisis, especially in companies that have received financial support from governments or where executive pay is perceived to be excessively high. A recent study does indeed not show that institutional investors are voting with much higher levels of opposition<sup>571</sup>.

In 2008, the US Congress passed the Emergency Economic Act. It authorised the US Treasury Secretary to establish a Troubled Asset Relief Program (TARP) so that the US government could purchase up to US\$700 billion of mortgage-backed and other troubled assets from financial institutions. Those financial institutions involved in TARP are required to meet the following corporate governance standards: the requirement for companies to eliminate compensation structures that encourage unnecessary and excessive risk being taken by executives; a provision for claw-back of any bonus or incentive-based compensation paid to senior executive officers where it is subsequently proven that the criteria, for example statement of earnings, were inaccurate; and a prohibition of certain types of 'golden parachute' payments (also known as 'golden goodbyes'). Thus, there is no doubt that the level of the remuneration transparency has increased in some US companies.

At the supranational level, the European Commission has been very active on the issue of remuneration disclosure. In 2010, The Commission issued a Green Paper on *Corporate governance*

---

<sup>568</sup> *ibid.*

<sup>569</sup> *ibid.*

<sup>570</sup> Martin Conyon and Graham Sadler, 'Shareholder Voting and Directors' Remuneration Report Legislation: Say on Pay in the UK' (2010) 18 (4) *Corporate Governance: An International Review* 296.

<sup>571</sup> Fabrizio Ferri and David A. Maber, 'Say on Pay Votes and CEO Compensation: Evidence from the UK' (2011) <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1420394](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1420394)> accessed 3 August 2014.

*in financial institutions and remuneration policies*<sup>572</sup>, which *inter alia* consulted on the recommendation of a binding or advisory shareholder vote on remuneration policy, and greater independence for non-executive directors involved in determining remuneration policy. In 2011 another Green Paper, *The EU corporate governance framework*<sup>573</sup>, was passed, with responses invited to various consultation questions. These included whether disclosure of remuneration policy, the annual remuneration report (a report on how the remuneration policy was implemented in the past year), and individual remuneration of executive and non-executive directors should be mandatory; and also whether shareholders should have a mandatory right to vote on the remuneration policy and the remuneration report. In 2014, the European Commission<sup>574</sup> adopted Regulatory Technical Standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile (so-called 'material risk takers'). These standards identify risk takers in banks and investment firms. Internal Market and Services Commissioner Barnier<sup>575</sup> said the following:

'Some banks are doing their utmost to circumvent remuneration rules. The adoption of these technical standards is an important step towards ensuring that the capital requirement rules on remuneration are applied consistently across the EU. These standards will provide clarity on who new EU rules on bonuses actually apply to, which is key to preventing circumvention. In addition, the European Banking Authority has a mandate to ensure consistent supervisory practices on remuneration rules among competent authorities. The Commission will remain vigilant to ensure that new rules are applied in full.'

## G. CONCLUSIONS

The main goal of this chapter is to show the merits and drawbacks of the American and British corporate governance system. Moreover, this chapter aims to reinforce my discussion on corporate hybridisation in chapter III.

---

<sup>572</sup> European Commission, 'Corporate governance in financial institutions and remuneration policies' (2 June 2010) <[www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0284:FIN:EN:PDF](http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0284:FIN:EN:PDF)> 6 February 2014.

<sup>573</sup> European Commission, 'The EU corporate governance framework' (5 April 2011) <[www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0164:FIN:EN:PDF](http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0164:FIN:EN:PDF)> accessed 6 February 2014.

<sup>574</sup> European Commission, 'New Initiatives in Response to the Financial Crisis' (11 July 2014) [www.ec.europa.eu/internal\\_market/company/directors-remun/index\\_en.htm](http://www.ec.europa.eu/internal_market/company/directors-remun/index_en.htm) accessed 24 July 2014.

<sup>575</sup> Michael Barnier in European Commission, 'Commission adopts new standards to increase transparency over bankers' pay and risk profiles' (Brussels, 4 march 2014) <[www.europa.eu/rapid/press-release\\_IP-14-210\\_en.htm?locale=en](http://www.europa.eu/rapid/press-release_IP-14-210_en.htm?locale=en)> accessed 12 August 2014.

Accordingly, in sections B-D, I go back to the issue of a compliance framework, shareholder value and a board of directors. I analyse how they are regulated in the US and the UK, how they are linked to those hybrid solutions in chapter III, and, briefly, how those regulations differentiate from each other and their Polish equivalents. With respect to the latter, I dedicate subsections 1-3 in section D to such issues as a better information flow between board members, board members' independence and board diversity, as they are found problematic in Polish corporate governance.

In this chapter, in sections F and G, I also raise the issue of directors' remuneration and its disclosure, which is not directly connected with hybridisation of corporate governance. However, it was important to include this issue within my research due to the fact that it was raised by my research participants during interviews. Presented from the Anglo-American perspective, it better exposes, in the subsequent chapters, the weakness of the Polish approach as to this issue.

The following chapter is an analysis of corporate governance in Poland.

## **V. CORPORATE GOVERNANCE IN POLAND**

### **A. INTRODUCTION**

The main theme of this chapter is corporate governance in Poland. Its main purpose is to answer my two first research questions, namely:

- What are the weaknesses of the Polish corporate governance system?
- What changes should be made to corporate governance in Poland?

This chapter deals with such issues as the consolidated ownership structure in Polish companies, the board structure, remuneration policy and corporate disclosure. In order to show corporate governance in Poland in a broader scope, I also refer to American and British corporate practices.

I based the analysis of this chapter mainly on the Act of 15 September 2000 on Commercial Partnerships and Companies (the Company Code of 2000) and the Warsaw Stock Exchange's Best Practices Code of 2010. These two acts are the main regulators of corporate governance in Poland.

This chapter is an introduction to a qualitative analysis of data collected during interviews in Poland. Thus, it raises issues that are developed in the subsequent chapter.

### **B. THE CORPORATE GOVERNANCE OUTLINE**

With some exceptions (see Appendix 3), we can talk about corporate governance in Poland in relation to a limited liability company and a joint-stock company. These two business forms are required by the Company Code of 2000 to operate through authorities.

Polish corporate governance is predominantly a two-tier board system embracing a supervisory board and a management board. As is usual, the supervisory board supervises the management board and oversees the company's financial statements, it also reports to the shareholders on the actions of the company. The management board conducts the day-to-day business of the company and is responsible for issues that are not the area of the supervisory board or the shareholders' meeting. The company's articles of association/statutes<sup>576</sup> often expands on the areas to be covered by the management board.

---

<sup>576</sup> Articles of association, together with the memorandum of association, are the constitution of a limited liability company. Statutes perform the same function in a joint-stock company.

<b>SHEREOLDERS' MEETING</b> - Obligatory in every company; - Appoints and removes members of the supervisory board in a JSC, and members of the management board in an LLC; - In any case and regardless of the manner of appointment, the general shareholders' meeting may remove or suspend the members of the management board.		
<b>INDIVIDUAL CONTROL</b> - Only in an LLC; - Shall be conferred upon each shareholder. - At any time, the shareholder may inspect the books and documents of the company, prepare a balance sheet for his or her personal use or request the management board to provide explanations; - It can be restricted if there are reasonable grounds to believe that the shareholder will use it for purposes contrary to the company's interest, thus causing material damage to the company; - When restricted, the shareholder may appeal to the registry court.	<b>MANAGEMENT BOARD</b> - Obligatory in every company; - Composed of executive directors only; - Directors can be appointed from amongst the shareholders; - In a JSC, directors are appointed and removed by the supervisory board, unless the statutes provide otherwise; - The shareholders' meeting and the supervisory board may not give binding instructions to the management board concerning the management of the company's affairs; - The articles of association/statutes may provide for the obligation of the management board to obtain the consent of the supervisory board prior to undertaking actions set forth in the articles of association/statutes; - No committees on the management board.	<b>SUPERVISORY BOARD</b> - Obligatory in a JSC; - Voluntary in an LLC in which share capital does not exceed PLN 500,000, and the number of shareholders does not exceed 25; - There is no requirement to appoint independent supervisors; - Appointed and removed by the shareholders' meeting; - An <b>AUDITORS' COMMITTEE</b> can also be established in an LLC, together with or without the supervisory board. It is appointed and removed by the shareholders' meeting.

**Table 4.** Corporate governance in Poland<sup>577</sup>

This is a general picture of corporate governance in Poland. When we take a closer look at exactly how it works, it turns out that the governance is far less coherent. A supervisory board might only be a supervisory organ in theory and not a management organ. In reality, 'it cannot be excluded from participation in the firm's influence structure'<sup>578</sup>. Oplustil and Radwan<sup>579</sup> aptly describe the main feature of the Polish corporate governance system as being 'the prevalence of consolidated

<sup>577</sup> Prepared on the basis of the Company Code of 2000.

<sup>578</sup> Kozarzewski & Woodward (n 4).

<sup>579</sup> Oplustil & Radwan (n 7) 490.

ownership where controlling shareholders extend their influence via the supervisory board.'

## C. THE OWNERSHIP STRUCTURE

Indeed, empirical evidence clearly points out that ownership of Polish public companies remains in the hands of the largest shareholders<sup>580</sup>: 'Voting control in listed companies shows a median concentration rate of 39.5%, with a sustainable trend visible over the last decade. Anglo-Saxon style companies, with dispersed ownership and control exercised by managers ("Berle-Means-corporations") do not exist in Poland'<sup>581</sup>. According to Morck and Steier<sup>582</sup>, in Anglo-Saxon countries, in particular the US and the UK, great companies are owned by millions of middle class shareholders, each owning a few hundred or a few thousand shares. Only a handful of institutional investors accumulate large stakes – 3 or even 5% of an occasional large firm's stock.

The most recent survey on ownership structure in Poland, the Federation of European Stock Exchanges survey<sup>583</sup>, was done in 2008. According to it, in 2007, foreign investors owned the largest number of shares in Polish companies (42% of the total number of listed shares), followed by private financial enterprises (26%), with the public sector (14%), individual investors (12%), and private non-financial companies and organisations (6%) holding the remainder (see Appendix 4, in which I summarise the main categories of share ownership in the UK in the years 1963-2010).

Oplustil and Radwan<sup>584</sup>, in their *Company Law in Poland (...)*, refer to the same survey conducted before 2006, according to which the ownership structure of Polish companies in 2005 was similar to the structure in 2007, namely, foreign investors held 38% of the total amount of listed shares, the public sector – 20%, individual investors – 17%, private financial enterprises – 17% and private non-financial companies and organisations – 8%. The date of the publication, 2010, suggests that there had not been a significant change in the ownership structure in Poland since the early 1990s. Importantly, the ownership of the public sector had increased from 14% to 20% between 2005 and 2007. The State Treasury's<sup>585</sup> website clearly points out that, despite the progress of privatisation, the State Treasury remains a major shareholder in numerous companies, particularly

---

<sup>580</sup> Dzierżanowski & Tamowicz (n 8); see also Maria Aluchna, 'Does Good Corporate Governance Matter? Best Practice in Poland' (2009) 32 (2) Management Research News 185.

<sup>581</sup> Oplustil & Radwan (n 7) 453.

<sup>582</sup> Morck & Steier (n 25).

<sup>583</sup> Federation of European Stock Exchanges, 'Share Ownership Structure in Europe' (December 2008) < [www.webcache.googleusercontent.com/search?q=cache:mGXByYUH1EoJ:www.fese.eu/en/%3Finc%3Dart%26id%3D8+&cd=1&hl=en&ct=clnk&gl=pl](http://www.webcache.googleusercontent.com/search?q=cache:mGXByYUH1EoJ:www.fese.eu/en/%3Finc%3Dart%26id%3D8+&cd=1&hl=en&ct=clnk&gl=pl) /> accessed 28 March 2014.

<sup>584</sup> Oplustil & Radwan (n 7) 453-454.

<sup>585</sup> See [www.msp.gov.pl/en](http://www.msp.gov.pl/en) - Ministry of Treasury (Republic of Poland).

those considered vital for national security or the economy, eg oil, gas, mining, but also some banks (see Appendix 5).

Oplustil and Radwan<sup>586</sup> note that, in 2005, controlling or majority shareholders tended to be either other companies active in the same industry (creating a corporate group), or the founders of a company together with their family members. Moreover, in line with Dzierżanowski and Tamowicz<sup>587</sup>, many joint-stock companies are family businesses controlled by their founders. This frequently leads to a combination of three roles for one person (or group of connected entities) – that of founder, shareholder and manager. Financial investors (most often banks, investment funds and pension funds) are the typically second and third biggest shareholders<sup>588 589</sup>.

Polish corporate practice suggests that the size of shareholding in a given company might actually be larger than the figure declared in the annual report. It has been revealed that some investors hold a larger number of shares in companies that are connected with them. A good example is the scandal involving PKN Orlen (the largest Polish company) in 2004. One of Orlen's shareholders, Kulczyk Holding, might have owned 10% instead of 5.6% of notified shares in companies controlled by its owner Jan Kulczyk. However, resulting investigations failed to prove any wrongdoing on the part of Mr Kulczyk.<sup>590</sup> One possible clue as to why Mr Kulczyk might have hidden the facts is provided by the Company Code voting restrictions. The Code of 2000 states that the statutes of a JSC may restrict the voting rights of shareholders holding over one-tenth of the aggregate number of votes in the company. The number of a shareholder's votes is increased by

---

<sup>586</sup> Oplustil & Radwan (n 7) 454.

<sup>587</sup> Dzierżanowski & Tamowicz (n 8); see also Stroiński (n 11).

<sup>588</sup> Oplustil & Radwan (n 7) 454.

<sup>589</sup> In light of this, in 2006, two chambers combining Polish investment funds and pension funds adopted the Code of Best Practices of Institutional Investors, with the aim of promoting institutional investor activism. The Code is 'based upon a concept of the institutional investor as an active and responsible minority shareholder who exercises shareholders' rights (particularly voting rights) in matters significant for the company as well as in all corporate decisions relevant for the institutional investor's clients'; Oplustil & Radwan (n 7) 454. Furthermore, institutional investors are supposed to play a monitoring role and pursue the observance of high corporate governance standards by the company. In particular, institutional investors should participate in any general meeting of companies in which, on their own behalf or on behalf of their clients, they administer a shareholding equal to or greater than 5% of votes (sec. 7.1). In cases where this threshold is not met, institutional investors should participate in a general meeting, if the issues debated during the session are of significant importance for the company, and the omission to execute the right to vote could increase the risk of a significant decrease in the value of the owned shareholding (sec. 8.1). Institutional investors should disclose their voting behaviour and policies for the purposes of transparency (sec 5.3). The text of the Code is available on: <[www.izfa.pl/en/index.php?id=10024](http://www.izfa.pl/en/index.php?id=10024)> accessed 13 April 2014.

<sup>590</sup> PAP, 'Jan Kulczyk świadkiem w sprawie PKN Orlen' (*WP.PL wiadomości*, 10 August 2004) <[www.wiadomosci.wp.pl/kat,1342,title,Jan-Kulczyk-swiadkiem-w-sprawie-PKN-Orlen,wid,5570794,wiadomosc.html](http://www.wiadomosci.wp.pl/kat,1342,title,Jan-Kulczyk-swiadkiem-w-sprawie-PKN-Orlen,wid,5570794,wiadomosc.html)> accessed 18 March 2014; PAP, 'Kulczyk pozbywa się akcji Orlenu' *Wprost* (29 October 2004) <[www.wprost.pl/ar/69658/Kulczyk-pozbywa-sie-akcji-Orlenu/](http://www.wprost.pl/ar/69658/Kulczyk-pozbywa-sie-akcji-Orlenu/)> accessed 27 March 2014; Dariusz Jaworski, 'Kim pan jest, panie Kulczyk – sylwetka najbogatszego Polaka' *Gazeta.pl Wiadomości* (15 July 2011) <[www.wiadomosci.gazeta.pl/wiadomosci/1,114873,2162394.html](http://www.wiadomosci.gazeta.pl/wiadomosci/1,114873,2162394.html)> accessed 17 April 2014; See also, for example, 'BOMI: Przekroczenie progu 10% ogólnej liczby głosów w skutek udzielenia pełnomocnictwa' (*Bankier.pl*, 7 April 2013) <[www.bankier.pl/wiadomosc/BOMI-Przekroczenie-progu-10-ogolnej-liczby-glosow-w-wyniku-udzielonego-pelnomocnictwa-2882126.html](http://www.bankier.pl/wiadomosc/BOMI-Przekroczenie-progu-10-ogolnej-liczby-glosow-w-wyniku-udzielonego-pelnomocnictwa-2882126.html)> accessed 10 March 2014.



the number of votes that the shareholder has as a pledgee or usufructuary or under another legal title.<sup>591</sup>

The ownership structure in Poland results in a number of problems, such as conflicts between majority shareholders and minority shareholders, private benefits of control at the expense of the minority (eg tunnelling of assets and profits to majority shareholders, payment of hidden dividends), and the inequality in the treatment of minority shareholders by company authorities<sup>592</sup>. There are also cases of abuse of shareholders rights by individual investors, especially challenging central resolutions of the shareholders' meeting in order to intimidate the company or its majority shareholders, resulting in the adoption of legislation aimed at curbing abuse by small shareholders (eg Art. 423§1 and 2 of the Company Code of 2000)<sup>593</sup>.

## **D. THE CONCENTRATION OF CORPORATE CONTROL**

### **1. Reasons for the high concentration of corporate control**

What are the motives for the high concentration of corporate control? According to La Porta *et al.*<sup>594</sup>, ownership concentration is 'the investors reply to poor protection of shareholder rights'. Dzierżanowski and Tamowicz<sup>595</sup> observe that there have been several cases of expropriation of minority shareholders in Poland – ranging from opportunistic manager behaviour, tunnelling and self-dealing by strategic investors, failures to provide the public with vital information about the company, insider trading and paying the minority shareholders significantly lower dividends than the ones paid for controlling shares. Both authors argue that investors' awareness of protection and especially enforcement of minorities' rights is rather poor in Poland.

For Shleifer and Vishy<sup>596</sup>, poor enforcement of minority shareholder rights makes the concentration of ownership and control inevitable, as it addresses the problem of unaccountable managers. Dzierżanowski and Tamowicz<sup>597</sup> argue that 'part of the process was caused by changes in privatisation strategies – combining flotation with a sale to the so-called strategic investor.' Their consequences are explained as follows:

---

<sup>591</sup> Art. 411§3CCC. See also the official translation of the Company Code of 2000; Ewa Kucharska (ed) *Kodeks spółek handlowych. Code of commercial companies* (4th edn, Wolters Kluwer Polska 2011).

<sup>592</sup> Dzierżanowski & Tamowicz (n 8).

<sup>593</sup> Oplustil & Radwan (n 7) 455.

<sup>594</sup> La Porta *et al.* (n 22).

<sup>595</sup> Dzierżanowski & Tamowicz (n 8).

<sup>596</sup> Andrei Shleifer and Robert W. Vishny, 'Large Shareholders and Corporate Control' (1986) 94 *Journal of Political Economy* 461.

<sup>597</sup> Dzierżanowski & Tamowicz (n 8).

‘Poor enforcement allowed strategic investors and other (...) [shareholders] to extract private benefits at the expense of minority shareholders. Additionally, very often the prices offered to minorities by strategic investors were very unfair. The liquidity of these companies was also affected. On the other hand, new family companies entering the market were not able to attract new institutional investors – partly because of their size (low liquidity) and partly because of their unwillingness to transfer control to the market, and poor management. (...) [T]he State Treasury’s willingness to cash and capture premiums for control engendered the preference to sell large stakes to strategic investors, rather than to disperse the ownership on the market (through IPO [indirect privatization; the procedures of privatisation in Poland are explained in chapter VI]).’<sup>598</sup>

The weak shareholder protection argument might have been somewhat justified by the difference in the number of shares owned by domestic and foreign investors in the first decade after the economic turnabout in Poland in 1989<sup>599</sup>. On average the largest number of shares owned by foreign strategic investors was much higher (67%) than those owned by domestic companies or individuals (43.5% and 40.6% respectively)<sup>600</sup>. As Dzierżanowski and Tamowicz<sup>601</sup> point out, foreigners with limited knowledge and access to courts and judges preferred to acquire a bigger number of shares to execute their rights than domestic investors usually more familiar with the local legal system.

One reason for the concentration trend is partially the opportunism of Polish managers. There were many examples of empire building and high executive remuneration contracts in the early 1990s. Over the next few years, many of them were changed into ‘over-diversified conglomerates’<sup>602</sup>. Then, all of these companies were heavily restructured (this included firing ‘old’ managers<sup>603</sup>) as a result of pressure from foreign strategic or institutional investors.<sup>604</sup>

Two factors allowed for managerial opportunism to develop in the early 1990s. The first cause was privatisation strategies employed by the state combined with the unfledged capital market (a shortage of domestic institutional shareholders). Many state enterprises were privatised through indirect privatisation (occasionally with significant assets left in the State Treasury’s hands),

---

<sup>598</sup> *ibid.*

<sup>599</sup> *ibid.*

<sup>600</sup> *ibid.*

<sup>601</sup> *ibid.*

<sup>602</sup> *ibid.*

<sup>603</sup> Many of them were directors of these enterprises before privatisation.

<sup>604</sup> Dzierżanowski & Tamowicz (n 8).

during which directors and employees obtained a privileged position due to political reasons<sup>605</sup>. Many enterprises, which later offered their shares to the public, were privatised through management and employee buy-outs. This is one reason why the position of company directors became very strong. The second cause was weak competition in the market<sup>606</sup>, as:

‘[d]omestic rivalry was non-existent and inflow of FDI quite thin due to an unstable and discouraging economic environment. (...) [This] competition was thus unable to force corporations to [make] market adjustments in a short time, especially if they inherited a monopolistic position. This situation created room for managers of public, formerly state-owned corporations (which constituted the largest fraction of public corporations) to engage in ineffective expansion projects.’<sup>607</sup>

## **2. Reasons for the high concentration of corporate control maintenance**

In addition to privatisation misuses and managerial opportunism, Polish corporate law provides the following legal devices to leverage control over cash flow assets:

- a) preferred shares (a share may carry more than one vote; forbidden in public companies)<sup>608</sup>;
- b) voting cap (supermajorities and high quorum requirements for voting at a shareholders’ meeting)<sup>609</sup>; and
- c) non-voting shares<sup>610</sup> (introduced since 2001).<sup>611</sup>

Control can also be leveraged through hierarchical structures (pyramids), cross shareholdings, acquisitions through subsidiaries and dependent entities. The following devices might be employed to defend against hostile take-overs, except for the above:

- a) authorised capital (introduced since the beginning of 2001)<sup>612</sup>; and

---

<sup>605</sup> *ibid*; Piotr Kozarzewski, ‘Corporate Governance and Secondary Privatisation in Poland: Legal Framework and Changes in Ownership Structure’ (Centre for Social and Economic Research, Studies & Analyses CASE No. 263, Warsaw 2003) <[www.case-research.eu/en/node/56038](http://www.case-research.eu/en/node/56038)> accessed 16 April 2014.

<sup>606</sup> At the beginning of the 1990s many product markets, although formally liberalised, were still protected by monopolies and (declining) tariffs; see Dzierżanowski & Tamowicz (n 8).

<sup>607</sup> *ibid*, Dzierżanowski & Tamowicz.

<sup>608</sup> See Art. 242, 351 and 352CCC.

<sup>609</sup> See, for example, Art. 415§3CCC.

<sup>610</sup> Art. 353CCC.

<sup>611</sup> Dzierżanowski & Tamowicz (n 8).

<sup>612</sup> Art. 444CCC.

b) own share purchase (only up to 20% of shares)<sup>613</sup>.<sup>614</sup>

Empirical research<sup>615</sup> proves that in particular, preferred shares with multiple voting rights are the most common device to leverage control over cash flow rights. Out of 220 surveyed companies, 79 issued preferred shares, mainly smaller companies founded by individuals or companies privatised through management and employee buy-outs. In the majority of cases (81%) five votes were attached to one share, which was the maximum number of votes that is allowed to be attached to one share.<sup>616</sup>

‘Pyramids’ seem to be much less popular than preferred shares<sup>617</sup>. A good example of such hierarchical structure could be Ryszard Krauze who controlled (through Prokom Investment (private) and Prokom Software (public)) a large range of other companies, including: Wirtualna Polska (Wirtual Poland – the largest portal) and Softbank (a public corporation providing sophisticated software for banks). The Company Code of 2000 lowered the number of votes per share from five to two, additionally forbidding issues of preferred shares by public companies<sup>618</sup>. This amendment might force shareholders to shift to pyramids and search for new control devices.<sup>619</sup>

One method of fuelling control is own-share purchase executed by subsidiaries<sup>620</sup>. It was implemented in 20 companies out of 210 surveyed. In eight corporations the block owned by a subsidiary was the largest one with an average size of 22%; in five cases, it was the second largest (regular size 13%). The leverage action undertaken through subsidiaries could be additionally supported through the purchase of own shares by the corporation in question.<sup>621</sup> Since January 2001 any company is allowed purchase up to 20% of its own shares in order to prevent substantial damage directly threatening the company<sup>622</sup>.

In some company statutes, a voting cap has been utilised as a device enhancing control, and a handy solution to defend against a take-over threat<sup>623</sup>. For example, Agora (media group) forbade individual shareholders to execute more than 20% of votes (except holders of preferred shares),

---

<sup>613</sup> Art. 362-365CCC.

<sup>614</sup> Dzierżanowski & Tamowicz (n 8).

<sup>615</sup> *ibid.*

<sup>616</sup> *ibid.*

<sup>617</sup> *ibid.*

<sup>618</sup> Art. 351§2CCC.

<sup>619</sup> Dzierżanowski & Tamowicz (n 8).

<sup>620</sup> *ibid.*

<sup>621</sup> *ibid.*

<sup>622</sup> Art. 362§2 (2) CCC

<sup>623</sup> Dzierżanowski & Tamowicz (n 8).

unless they have at least 75% as a result of a mandatory bid for all outstanding shares<sup>624</sup>.

At the beginning of 2001, authorised capital was introduced by way of a new company law. It provides for the management board (upon the decision of the shareholders' meeting) to issue – within three years – new shares of a total value not exceeding three-fourth of existing share capital<sup>625</sup>. This measure was included with the Company Code of 2000 'to improve company ability to tap the market at the right time'. Nevertheless, it may also be used as an anti-take-over device, specifically if the management permission allows the issue of shares without preventive rights.<sup>626</sup>

## E. THE INSIDE STRUCTURE AND DISTRIBUTION OF POWERS

Another factor that definitely has a negative influence on the ownership structure in Poland is the allocation of power in corporate governance. While it is a good practice to keep a certain balance of power between corporate organs, the Company Code of 2000 significantly extends the competencies of the supervisory board over the management board.

### 1. The management board

The management board of JSCs in Poland shall be composed of one or more members, who are appointed and removed by the supervisory board unless the statutes provide otherwise<sup>627</sup>. Above all, the statutes may grant the shareholders' meeting (called the general meeting in a JSC) the power to appoint or suspend members of the management board<sup>628</sup>. Furthermore, the right to appoint an indicated number of executive directors may be given to a specific shareholder as a personal right<sup>629</sup> or even to a third party<sup>630</sup>. Members of the management board may be appointed from among the shareholders or other persons<sup>631</sup>.

---

<sup>624</sup> Agora, 'Statut Agory Spółki Akcyjnej' <[www.agora.pl/agora/1,110747,10427459,Statut\\_Agory\\_Spolki\\_Akcyjnej.html#TRNavSST](http://www.agora.pl/agora/1,110747,10427459,Statut_Agory_Spolki_Akcyjnej.html#TRNavSST)> accessed 25 July 2014.

<sup>625</sup> Art. 444CCC.

<sup>626</sup> Dzierżanowski & Tamowicz (n 8).

<sup>627</sup> Art. 368§2 and 4 CCC (for a JSC), and Art. 201§2CCC (for an LLC).

<sup>628</sup> Art. 368§4CCC. In an LLC, members of the management board shall be appointed and removed by a shareholders' resolution – unless the articles of association provide otherwise.

<sup>629</sup> Art. 354§1CCC.

<sup>630</sup> See, for example, Andrzej Kidyba, *Kodeks Spółek Handlowych. Komentarz*, vol 2 (7th edn, Wolters Kluwer Polska 2010) 292. With respect to an LLC – see Andrzej Kidyba, *Kodeks Spółek Handlowych. Komentarz*, vol 1 (7th edn, Wolters Kluwer Polska 2010) 841.

<sup>631</sup> Art. 368§3CCC; for an LLC – Art. 201§3CCC.

A member of the management board shall not hold his office for more than five years. Reappointment as a member of the management board (in a JSC) is permitted for terms of office not exceeding five years.<sup>632</sup> A partial replacement of board members may be provided for in the company's statutes<sup>633</sup>. In any case and regardless of the manner of appointment, the members of the management board may be removed or suspended directly by the general shareholders' meeting<sup>634</sup>. Thus, the shareholders ultimately decide the personal composition of the management board. Due to the fact that any member may in principle be removed at any time and without cause, the position of members of the management board remains weak vis-à-vis the shareholders<sup>635</sup>. However, this may be strengthened by shareholders in the statutes by limiting the possibility of their removal to important reasons<sup>636</sup>. JSCs commonly implement these provisions<sup>637</sup>.

The management board is responsible for the managing company's affairs and representing the company outside<sup>638</sup>. Where the management board is composed of more than one person, all of its members have the right and duty to jointly conduct the company's affairs unless the statutes provide otherwise<sup>639</sup>. This means that all company matters are decided by the entire board by way of a resolution (by an absolute majority of votes unless the statutes provide otherwise)<sup>640</sup>. Exceptions to the collegiality principle are allowed, but only in the statutes of the company and not in the internal rules of the board. The statutes may provide for an inside division of directors' duties and responsibilities in relation to different fields of the company's activity that may be based either on functional or geographical criteria.<sup>641</sup> The right of a member of the management board to represent the company shall cover all court and out-of-court actions undertaken by the company<sup>642</sup>.

---

<sup>632</sup> Art. 369§1CCC. The reappointment of a given member of the management board shall be made no earlier than one year prior to the expiration of his current term of office; Art 369§1. With respect to an LLC – see Kidyba, vol 1 (n 630) 850; a member of the management board in an LLC can be even appointed for an unlimited period of time.

<sup>633</sup> Art. 369§1CCC (for a JSC).

<sup>634</sup> Art. 368§4CCC; for an LLC – Art. 203§1.

<sup>635</sup> Art. 370§1CCC. This shall not deprive the dismissed member of the right to raise claims related to his or her employment or any other legal relationship concerning the performance of the function of a management board; Art. 370§1. For an LLC – Art. 203§1CCC.

<sup>636</sup> Art. 370§2CCC (for a JSC) and 203§2CCC (for an LLC).

<sup>637</sup> Oplustil & Radwan (n 7) 474.

<sup>638</sup> Art. 368§1CCC (for a JSC) and 201§1CCC (for an LLC).

<sup>639</sup> Art. 371§1CCC.

<sup>640</sup> Art. 371§2CCC. With respect to an LLC, where the management board is composed of more than one member and the articles of association do not provide otherwise, each member of the management board shall have the right and duty to conduct the company's affairs; §1 and 2 of Art. 208CCC. Each member of the management board may, without a prior resolution of the management board, conduct the company's affairs within the ordinary course of the company's business; §3 of Art. 208. If, before handling any matter referred to in §3 (above), any other member of the management board objects to the handling thereof or if such matter is beyond the ordinary course of the company's business, a prior resolution of the management board shall be required; §4 of Art. 208. Resolutions of the management board shall be adopted by an absolute majority of votes; §5 of Art. 208.

<sup>641</sup> Oplustil & Radwan (n 7) 474.

<sup>642</sup> Art. 372§1CCC. The right of a member of the management board to represent the company may not be restricted by a legal effect with respect to third parties; §2 of Art. 372. For an LLC – Art. 204§1 and 2CCCC.

Where the management board is composed of more than one member, the manner in which the company is represented shall be set forth in the statutes. Where the statutes do not contain any provisions in the above respect, the joint action of two members of the management board or one member and a holder of a commercial power, shall be required to make statements on behalf of the company.<sup>643</sup>

The management board remains independent of other governing bodies in the company, and members of the management board are bound to act in the best interest of the company. A controversy concerning the degree of directors' autonomy arose on the ground of regulation of Art. 375 of the Company Code of 2000, which provides that members of the management board shall be subject to the restrictions set forth in the law, the statutes, the by-laws of the management board and resolutions of the supervisory board and the general meeting. For that reason, a new Art. 375<sup>1</sup> was implemented in 2003. It clearly states that the general meeting (shareholders' meeting in LLCs) and the supervisory board may not give binding instructions to the management board concerning the management of the company's affairs<sup>644</sup>. Yet, it needs to be underscored, that the corporate practice of many Polish JSCs (including listed companies) departs from this statutory pattern. Due to the common concentrated ownership structure for companies in Poland, company directors are in reality strongly contingent on the majority shareholder (usually another legal entity, mostly controlling company or a 'head' of a corporate group). Eventually the directors might only be responsible for implementing a strategy defined at the parent company level (see chapter VI, in which my research participants confirm the state of affairs).<sup>645</sup> This actual reliance is strengthened by the liberal rules on directors' removal<sup>646</sup> mentioned above.

## 2. Directors' duties

The Company Code of 2000 provides that corporate officers (members of management board, supervisory board, auditors' committee and liquidators) shall be liable towards the company for any damage inflicted through an action or omission contrary to the law or the provisions of the statutes (or the articles of association – with respect to an LLC) unless they are not at fault. They

---

<sup>643</sup> Art. 373§1CCC. Statements towards the company and delivery of letters to the company may be made towards one member of the management board or holder of a commercial power of attorney; §2 of Art. 373. The provisions of §§1 and 2 (above) shall not exclude the establishment of individual or joint commercial representation and shall not restrict the rights of holders of a commercial power of attorney resulting from the provisions on commercial representation; §3 of Art. 373. For an LLC – Art. 205§1, 2 and 3CCC.

<sup>644</sup> Art. 219§2CCC provides that in an LLC the supervisory board shall not have the right to issue any binding instructions to the management board in respect of managing the company's affairs.

<sup>645</sup> Oplustil & Radwan (n 7) 474.

<sup>646</sup> Art. 370§1CCC.

shall also, while performing their duties, act with due care resulting from professional integrity.<sup>647</sup> The provision recaps the normative contents of Art. 355§2 of the Civil Code of 1964, setting a higher standard against which the behaviour of a company's director is measured<sup>648</sup>. Therefore, directors are expected to possess knowledge and experience, and also care about the company's affairs as determined by the size and profile of the company<sup>649</sup>. For example, a relatively higher degree of knowledge, cautiousness and good judgment is required from directors of a large bank or insurance company than members of the management board of an ordinary business company. Even mere approval of the appointment by a person lacking qualifications required to properly execute the responsibilities of the director might be viewed as a violation of the standard of care by the acceptor.<sup>650</sup> As the case law provides, the observance of the standard of care involves 'the anticipation of the results of planned actions, the fulfilment of all current and legal measures in order to properly fulfil managerial duties as well as the preservation of forethought, diligence and prudence needed to achieve objectives that are in line with the interest of the company.'<sup>651</sup>

Polish corporate law is silent on the duty of loyalty of corporate officers. Yet, the existence of this duty is commonly recognised by jurisprudence and the legal doctrine. This general rule with regard to directors of listed companies was clearly articulated in the Codes of Best Practices of 2002 and 2005<sup>652</sup>:

'A management board member should display full loyalty towards the company and avoid actions which could lead to implementing exclusively their own material interest. If a management board member receives information on the possibility of making an investment or another advantageous transaction concerning the objects of the company, she or he should present such information immediately to the management board for the purpose of considering the possibility of the company taking advantage of it. Such information may be used by a management board member or be passed over to a third party only upon consent of the management board and only when this does not infringe the company's interest.'<sup>653</sup>

---

<sup>647</sup> Art. 483CCC (for a JSC) and 293CCC (for an LLC).

<sup>648</sup> Oplustil & Radwan (n 7) 481.

<sup>649</sup> For details, see Józef Okolski, Jerzy Modrzejewski and Łukasz Gasiński, 'Odpowiedzialność członków zarządu w spółkach kapitałowych – miernik staranności' in *Prawo Prywatne Czasu Przemian. Księga Pamiątkowa Dedykowana Profesorowi Stanisławowi Sołtysińskiemu* (Uniwersytet Adama Mickiewicza w Poznaniu 2005) 496.

<sup>650</sup> *ibid* 501; Tadeusz Dziurzyński in Tadeusz Dziurzyński, Zygmunt Fenichel and Mieczysław Honzatko, *Kodeks Handlowy. Komentarz* (Grand Gamma 1995) 322.

<sup>651</sup> Judgment of the Court of Appeal in Katowice of 5 November 1998, I Aca 322/98. See also judgment of Supreme Court of 17 August 1998, III CRN 77/93.

<sup>652</sup> Rule No. 35.

<sup>653</sup> Excerpt from the official translation by the Warsaw Stock Exchange.



Unfortunately, the Code of Best Practices of 2007 repealed this rule, reflecting the famous corporate opportunity doctrine from the Anglo-Saxon and German jurisprudence.

In the line with another provision of the Code of 2005, 'in transactions with shareholders and other persons whose interests have [an] impact on the interest of the company, the management board should act with utmost care to ensure that the transactions are at arms' length.'<sup>654</sup>

The duty of loyalty may be considered an integral constituent of the fiduciary relationship between the company and its officers<sup>655</sup>. The duty of loyalty is strongly connected with the business discretion given to them. The existence of such a duty may be inferred from a number of the Company Code of 2000 provisions, eg directors are subject to comprehensive statutory non-competition obligation.<sup>656</sup> They shall not engage in competitive entities as a partner in a partnership or a civil partnership, or a member of the authorities of a company, or participate in any competitive legal entity as a member of its authorities. The above prohibition shall also apply to participation in a competitive company if a member of the management board holds at least 10% of shares in such a company or has the right to appoint at least one member of the management board of such a company.<sup>657</sup>

Unless the statutes provide otherwise, consent shall be granted by the authority that has the power to appoint the management board<sup>658</sup>. In the event of a conflict of interests between the company and a member of the management board, the member's spouse, relatives by blood and second degree affinity and persons with whom he or she has a personal relationship, the member of the management board shall refrain from participating in the settlement of such disputes and may request that such fact be recorded in the minutes<sup>659</sup>. In relation to members of the supervisory board, a similar regulation is provided for in soft law, which is the Code of Best Practices of 2010:

'A member of the Supervisory Board should notify any conflicts of interest which have arisen or may arise to the Supervisory Board and should refrain from taking part in the discussion and from voting on the adoption of a resolution on the issue which gives rise to such a conflict of interest.'<sup>660</sup>

---

<sup>654</sup> Rule No. 34.

<sup>655</sup> Oplustil & Radwan (n 7) 482.

<sup>656</sup> *ibid.*

<sup>657</sup> Art. 380§1CCC (for a JSC) and 211§1CCC (for an LLC).

<sup>658</sup> Art. 380§2CCC (for a JSC) and 211§2CCC (for an LLC).

<sup>659</sup> Art. 377CCC (for a JSC) and 209CCC (for an LLC).

<sup>660</sup> Part III, No. 4.

In addition, the Company Code of 2000 provides for special treatment for loans, credit, a surety agreement or a similar agreement concluded by the company with or for the benefit of, among others, a member of the management board and supervisory board<sup>661</sup>. Execution of such an agreement requires the consent of the shareholders' meeting. Where execution of this agreement involves a dependent company and a member of the management board of the dominant company, the shareholders' meeting of the dominant company is required to give consent<sup>662</sup>.

Corporate law in Poland does not codify the business judgement rule<sup>663</sup>. This rule, as developed by US courts, is an assumption that in making a business decision, the directors of a company acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company<sup>664</sup>.

In the absence of legal framework, it cannot be assumed that the director, while conducting the company's affairs, met appropriate standards of due care and diligence. In contrast, each time a suit against the director (a supervisor) is filed, the burden of evidence in the legal proceedings lies with the defendant – the incriminated director or (the supervisor).<sup>665</sup>

In compliance with a ruling passed down by the Polish Supreme Court, a reference to an economic risk cannot excuse the manager, when the damage inflicted upon the company was the result of careless management<sup>666</sup>. On the other hand, Polish legal doctrine and courts admit that there is a significant degree of managerial discretion, including the power to accept a certain level of risk integral to a given business activity, provided that they observe proper standards of care and loyalty towards the company<sup>667</sup>. This view was reflected in the following rule of the Best Practices Code of 2002 and 2005:

‘While making decisions on corporate issues, members of the management board should act within the limits of justified economic risk, i.e. after consideration of all information, analyses and opinions, which, in the reasonable opinion of the management board, should be taken into account in a given case in view of the company's interest.’<sup>668</sup>

---

<sup>661</sup> Art. 15§1CCC (common for both an LLC and a JSC).

<sup>662</sup> Art. 15§2CCC (common for both an LLC and a JSC).

<sup>663</sup> cf German *Aktiengesetz* [German Stock Corporation Act] (sec. 93(1)), introduced with the UMAG-reform of 2005 (available on <[www.nortonrosefulbright.com/knowledge/publications/59658/german-stock-corporation-act-2010](http://www.nortonrosefulbright.com/knowledge/publications/59658/german-stock-corporation-act-2010)> accessed 18 January 2014. Oplustil & Radwan (n 7) 483.

<sup>664</sup> See, for example, *Aronson v Lewis*, 473A.2d, 805 (at 812) (Del. 1984). See also Stephen M. Bainbridge, *Corporation Law and Economics* (Foundation Press 2002) 269.

<sup>665</sup> Oplustil & Radwan (n 7) 483.

<sup>666</sup> Judgment of 9 May 2000, IV CKN 117/00.

<sup>667</sup> Judgment of Supreme Court of 26 January 2000, I PKN 482/99; Okolski *et al.* (n 624) 503; Józef Okolski and Dominika Wajda, ‘Odpowiedzialność członków zarządu spółek kapitałowych’ (2007) 2 Przegląd Prawa Handlowego 12.

<sup>668</sup> Rule No. 33.

Unfortunately, this provision has not been transferred to the new Code of Best Practices of 2010 (it was repealed by the Code of 2005).

### **3. The shareholders' meeting**

Directors are understandably responsible for their conduct before shareholders of the company.

The situation of shareholders in companies in Poland under the Company Code of 2000 echoes the old-style continental approach to the shareholder's meeting, giving them the power to decide a long list of issues. They concern substantial corporate actions and 'organic' changes in the structure of the company – changes to the company's statutes, mergers, divisions, transformation into another legal form of company or partnership and voluntary termination. Furthermore, the shareholders' meeting also approves minority squeeze-out from a non-listed company<sup>669</sup>, exclusion of shareholders' pre-emptive rights<sup>670</sup> and delisting<sup>671</sup>. The ordinary shareholders' meeting is authorised, among other things, to approve the annual report of the management board and to dispose of the financial resources of the company, ie the report into the distribution of profit or coverage the losses<sup>672</sup>. Any instructions by the management board or supervisory board regarding profit dissemination are not binding on the shareholders.<sup>673</sup>

Additional statutory powers of the shareholder's meeting are listed in Art. 393, the wording of which reads as follows:

'Apart from other matters specified in this Section or in the statutes, a resolution of the general meeting shall be required for:

- 1) examination and approval of the management board report on the company's operations, financial statements for the previous financial year and acknowledgment of the fulfilment of duties by members of the company's authorities;
- 2) decisions concerning claims for redressing damage inflicted upon formation of the company or exercising management or supervision;

---

<sup>669</sup> Art. 418CCC; qualified majority of 95% required. In an LLC, at the request of all other shareholders, the court may, due to important reasons concerning a given shareholder, decide to exclude that shareholder from the company; see Art. 266CCC.

<sup>670</sup> Art. 431§1CCC and 432§2CCC; qualified majority of 80% required. Art. 246§1CCC – for an LLC; a majority of two-thirds of the votes. See also Art. 257CCC.

<sup>671</sup> Art. 91 (4) of the Act of 29 July 2005 on Act on Public Offering, Conditions Governing the Introduction of Financial Instruments to Organised Trading, and Public Companies; qualified majority of 80% required.

<sup>672</sup> Art. 395§2CCC (for a JSC) and Art. 231§2CCC (for an LLC).

<sup>673</sup> Oplustil & Radwan (n 7) 475.

- 3) disposal or lease of the business enterprise or an organised part thereof, or establishment of a property right thereon;
- 4) acquisition and disposal of real property, perpetual usufruct, or of an interest therein unless the statutes provide otherwise;
- 5) issue of convertible bonds or senior bonds with priority of conversion into shares and issue of the subscription warrants referred to in Article 453§2;
- 6) acquisition of own shares in the circumstances set forth in Article 362§1 (2) and authorisation to acquire the same under the circumstances set forth in Article 362§1;
- 7) execution of the agreement referred to in Article 7.'

The attention of the corporate lawyer should also be drawn to the provisions empowering shareholders with respect to decisions about the business enterprise meaning the entirety of organized corporate assets or their part (Art. 393 (3))<sup>674</sup>. The Polish Supreme Court has interpreted it narrowly, excluding share deals (meaning disposal of shares of a subsidiary through which business activity was effectively conducted) outside its scope of application<sup>675</sup>.

As I have suggested above, a company's statutes may embrace other items in the list of matters requiring shareholders' approval so as to allow shareholders to adopt a set of tailor-made provisions fitting the needs of a particular company and to further reduce managerial discretion. However, if the management board violates an internal restriction regulated by the provisions, the transaction remains valid towards third parties. The infringement on the provisions by the board entails civil liability of board members to the company<sup>676</sup>.

## 4. The supervisory board

The body through which shareholders control the activity of directors is the supervisory board.

The supervisory board is a mandatory body for all JSCs and optional for LLCs. In LLCs whose share capital exceeds PLN 500,000 and which have more than twenty-five shareholders, the supervisory board or auditors' committee shall be established (otherwise companies may also establish the auditors' committee)<sup>677</sup>. The board shall be composed of at least three members, and

---

<sup>674</sup> This resolution shall be adopted by a qualified majority of three-fourths of votes; Art. 415§1CCC. Art. 246§1CCC for an LLC.

<sup>675</sup> Judgment of the Supreme Court of 23 October 2003 (V CK 411/02, OSNC 2004/12 item 197) – the ruling came out with respect to a limited liability company, but may be equally applied to a joint-stock company, where the powers of general meeting as laid down in the Company Code of 2000 are nearly identical to those conferred upon the shareholders of a limited company.

<sup>676</sup> Art. 17§3CCC (applied to both types of companies).

<sup>677</sup> Art. 213§1 and 2 CCC.

in listed companies, of at least five members to be appointed and removed by the shareholders' meeting<sup>678</sup>. The company's statutes may provide for a different manner for appointing and removing members of the supervisory board<sup>679</sup>. The right to appoint or remove a specified number of the members of the supervisory board may be conferred upon an individual shareholder<sup>680</sup>, upon a holder of a specified class of registered shares (preference shares<sup>681</sup>) or even upon a third party. The statutory right of employees (and suppliers) to select a specified number of supervisory board members (workers' codetermination) is laid down in Polish law to a limited extent. This right exists only in relation to companies subject to indirect privatisation<sup>682</sup> and allows the workers to elect two-fifths of the supervisory board members directly (I develop this issue in chapter VI – 'Employees and Bank Representatives on Supervisory Boards in Poland').

As Polish corporate law, as a rule, does not provide for employees' participation, minority shareholders' interests in the supervisory board can be accommodated. The Company Code of 2000 provides minority shareholders with a right to appoint their representatives to the board by way of the 'group vote'<sup>683</sup>. With regard to its function, the 'group vote' bears a resemblance to what is known as 'cumulative voting' provided for in jurisdictions of some US states<sup>684</sup>. At the request of shareholders representing at least one-fifth<sup>685</sup> of share capital, members of the supervisory board shall be elected at the next shareholders' meeting by a vote in separate groups, even if the statutes of the company provide otherwise<sup>686</sup>. However, holding one-fifth of the share capital might prove unsatisfactory to effectuate the appointment of a given shareholder's representative in the board<sup>687</sup>. The amount of shares allowing for this kind of electing group are determined by dividing the total number of shares represented at a given shareholders' meeting by the total number of supervisory board members<sup>688</sup> of that company<sup>689</sup>. Shareholders electing their representatives by

---

<sup>678</sup> Art. 385§1CCC (for a JSC) and 215§1CCC (for an LLC). The auditors' committee in an LLC shall be composed of at least three members appointed and removed according to the same principles as members of the supervisory board; Art. 217CCC.

<sup>679</sup> Art. 385§2CCC (for a JSC) and 215§2CCC (for an LLC). For further explanation see, for example, Kidyba, vol 1 (n 630) 931-933 and vol 2, 436-438; or Oplustil & Radwan (n 7) 477.

<sup>680</sup> Art. 354§1CCC (for a JSC) and Art. 215§2CCC (for a LLC).

<sup>681</sup> Art. 351CCC. See Art 174§1 – with respect to an LLC.

<sup>682</sup> See Art. 12–16 of the Act of 30 August 1996 on the Privatisation Act.

<sup>683</sup> Art. 385§3-9CCC (applied to JSCs exclusively).

<sup>684</sup> Oplustil & Radwan (n 7) 477.

<sup>685</sup> The fraction of share capital which is necessary to trigger the whole procedure (20%) is high in comparison to fractions required by law with regard to other minority rights (5% or 10%, see, for example, Art. 223, 400, 401CCC).

<sup>686</sup> Art. 385§3CCC. However, where a person appointed by persons (eg employees of the company) or an entity specified in a separate Act sits on the supervisory board, only the remaining members thereof shall be subject to election (Art. 385§4CCC).

<sup>687</sup> Oplustil & Radwan (n 7) 478.

<sup>688</sup> Where the company's statutes determine only the minimum or the minimum and maximum number of board members, the shareholders' meeting should first adopt a resolution determining the precise amount of board members to be elected; *ibid*.

<sup>689</sup> For example if the total number of board members under the statutes is three persons, the minimum threshold enabling the group to elect a board member amounts to 33%. In a board composed of four members, the threshold is 25%, where the aforementioned

means of a group vote are automatically excluded from the election process outside that group<sup>690</sup>. Thus, the minimum amount of shares required to form an election group is dependent on two variables: the amount of shares represented at a given shareholders' meeting, and the total number of board members. The higher the number of supervisors, the fewer shares are needed to form a voting group. The number of groups does not need to match the number of board members to be elected; only one group need be formed<sup>691</sup>. Vacancies on the board not filled by an electing group shall be filled by way of voting with the participation of all shareholders who did not cast their votes in a separate group<sup>692</sup>. Upon the election of at least one supervisory board member by group vote, the mandates of all existing members of the supervisory board expire before the end of their terms of office<sup>693</sup>. Moreover, the Company Code of 2000 gives each electing group an additional right to delegate one of the board members elected by that group to individually and permanently perform supervisory tasks<sup>694</sup>. Members so delegated have the right to attend meetings of the management board and provide advice thereat. Opalski<sup>695</sup> argues that the presence of minority shareholders in the supervisory board may have a destructive impact on the corporate governance of the company, jeopardising the internal consistency of the board and initiating conflicts amongst its members. The minority is also 'capable of disrupting the operational capacity of management and discouraging executive directors from discussing openly company's affairs'<sup>696</sup>.

The supervisory board is mainly responsible for exercising permanent supervision over the company's affairs in all aspects of its business<sup>697</sup>. In reality, the supervisory board acts periodically through meetings, which are convened when the need arises, but not less than three times in a financial year. Special duties of the supervisory board include evaluation of management board annual reports (reports on the company's operation and financial statements for the previous financial year) to assess compliance with the financial data, documents and the facts. Supervisory boards should also give an opinion on management board motions concerning distribution of profits or coverage of losses.<sup>698</sup> In order to perform its duties, the supervisory board may inspect all

---

percentages refer not to the whole share capital but to the share capital present or represented at the shareholders' meeting. For details, see Józef Frąckowiak in Kazimierz Kruczałak (ed), *Kodeks Spółek Handlowych. Komentarz* (LexisNexis 2001) 626.

<sup>690</sup> Art. 385§5CCC.

<sup>691</sup> Art. 385§7CCC.

<sup>692</sup> Art. 385§6CCC.

<sup>693</sup> Art. 385§8CCC.

<sup>694</sup> Art. 390§2CCC.

<sup>695</sup> Adam Opalski, *Rada Nadzorcza w Spółce Akcyjnej* (C.H. Beck 2006) 91.

<sup>696</sup> *ibid.*

<sup>697</sup> Art. 382§1CCC (for a JSC) and 219§1CCC (for an LLC).

<sup>698</sup> Art. 382§3CCC, and 389§3CCC (for a JSC), and Art. 219§3CCC (for an LLC). The duties of the auditors' committee shall include evaluation of management board annual reports (financial reports and reports on the operations of the company) and of motions of the management board concerning distribution of profit or coverage of losses. Furthermore, the duties of the auditors' committee shall

company documents, request reports and explanations from the management board and employees as well as review assets and liabilities of the company<sup>699</sup>. In principle, the supervisory board shall perform its duties collectively; it may nevertheless delegate its members to independently perform specific supervisory tasks<sup>700</sup>. The statutes may extend the powers of the supervisory board, and, in particular, provide for the obligation of the management board to obtain the consent of the supervisory board prior to undertaking the actions specified in the statutes<sup>701</sup>. Where the supervisory board refuses its consent to a specific corporate action, the management board may request the shareholders' meeting to adopt a resolution permitting the performance of such action<sup>702</sup>. The supervisory board itself is not entitled to determine a list of corporate actions that should require its prior consent. However, the Code of Best Practices of 2010 obliges the management board to request prior approval of significant corporate transactions (agreements) pursued with a related entity from the supervisory board<sup>703</sup>.

According to the Company Code of 2000<sup>704</sup>, the powers of the supervisory board shall also include the right to suspend all or individual members of the management board for important reasons (eg a lack of co-operation with the other directors, inappropriate co-operation with members of the supervisory board, hiding documents, etc<sup>705</sup>) and to delegate members of the supervisory board, for a period of no longer than three months, to temporarily perform the duties of members of the management board who have resigned, been removed, or who, for other reasons, are incapable of performing their duties.

## 5. The independence of supervisors

Another vital issue concerning the supervisory board is the independence of supervisors. This can undeniably be considered one of reasons for the high consolidation of share ownership in Polish companies.

The Company Code of 2000 does not impose an obligation of appointing independent members of the supervisory board. It does not state that explicitly, but it is silent about the

---

include submitting to the shareholders' meeting annual reports in writing presenting the outcome of the above evaluation in a manner and scope as set forth for such acts when performed by the supervisory board; Art. 221§1CCC.

<sup>699</sup> Art. 382§4CCC (for a JSC) and 219§1CCC (for an LLC).

<sup>700</sup> Art. 390§1CCC.

<sup>701</sup> Art. 384§1CCC (for a JSC) and 220CCC (for an LLC).

<sup>702</sup> Art. 384§2CCC.

<sup>703</sup> Part II, point 3.

<sup>704</sup> Art. 383§1CCC (for a JSC) and 220CCC (for an LLC).

<sup>705</sup> See, for example, Kidyba (n 630) 423.

obligation of appointing independent board members. However, the Code provides that a supervisor shall not at the same time perform a function of a member of the management board, holder of a commercial power of attorney, liquidator, head of a branch or a plant, chief accountant, attorney-at-law or advocate employed at the company. This provision applies to the audit committee, when it is appointed in an LLC.<sup>706</sup> The legal rule does not, however, guarantee that members of the supervisory board will remain objective towards the company's interests. They might have strong business or personal ties with the company, eg a significant shareholder in the company, some family connections with members of the management board, or long term employment in the company. In consequence, the notion of exclusion, rather than independence, comes into play here.

The issue of independence of supervisory board members in Poland has been regulated by a soft-law instrument, the Code of Best Practices, since 2002. Best Practices of 2002 required at least half of supervisory board members to be independent members<sup>707</sup>. Nonetheless, this overarching rule was not in agreement with the dominance of consolidated ownership where controlling shareholders influence the company's affairs via the supervisory board<sup>708</sup>. Therefore, an overwhelming majority of Polish companies declared non-compliance with that rule. As a consequence, an attempt to implement the Anglo-Saxon concept of independent directors in Poland was a partial failure.<sup>709</sup> Thus, the revised version of the Code of 2005 provided for a more flexible rule, according to which in companies where the majority shareholder holds more than 50% of the total votes, the supervisory board shall consist of at least two independent members<sup>710</sup>. Moreover, both versions of the code gave independent members special veto rights in relation to some resolutions of the supervisory board (eg resolutions approving related party transactions). As a matter of fact, this change had only a limited impact on the recognition of the rule by the companies. The current Code of Best Practices requires the participation of at least two independent members in the supervisory board regardless of the ownership structure of a company<sup>711</sup>.

As to the independence criteria, Best Practices clearly refer to Annex II of the Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board. Over and above the criteria regulated by Annex II, the Code of Best Practices of 2007 introduced two additional requirements. A person who is an employee of the company or an associated company cannot be deemed to meet

---

<sup>706</sup> Art. 214§1CCC (for a JSC) and 387§1CCC (for an LLC).

<sup>707</sup> Detailed criteria of what constitutes independence were to be laid down in company's articles/statutes; Oplustil & Radwan (n 7) 490.

<sup>708</sup> Oplustil & Radwan, *ibid.*

<sup>709</sup> *ibid.*

<sup>710</sup> Point 20.

<sup>711</sup> Part III, point 6.



the independence criteria described in the Annex. In addition, an actual and significant relationship with any shareholder who has the right to exercise at least 5% of all votes shall be seen as precluding the independence of that member.<sup>712</sup>

In contrast to their predecessors, neither Code grants independent board members a veto right with respect to specific activities. This questions the significance of the independence rule within the supervisory board. Having the same capabilities might make independent supervisors in Polish companies a lot less powerful in relation to the controlling shareholders. This might also deprive them of the opportunity to secure the company's interests.<sup>713</sup>

Another issue that should be taken into consideration is the 'comply and explain' character of the independence principle. Including that in the Company Code of 2000 might facilitate the functioning of corporate governance in all companies, not just those that decide to appoint independent supervisory board members. On the other hand, a more statutory regime doubtlessly leads to a 'box-ticking' approach that fails to allow for sound deviations from the rule and does not foster investors' trust<sup>714</sup>.

## 6. Other board issues

In chapter IV – 'Corporate Governance in the United States and the United Kingdom' – 'Chief Executive Officer Vs. Chairman', I mentioned that there is a weak flow of information and weak co-operation between directors (and officers – in case of American companies) in Anglo-Saxon companies. Similar problems exist within the Polish model of corporate governance with respect to the relationships between the management board and the supervisory board. As Oplustil and Radwan<sup>715</sup> declare, the problems and limitations of the Polish two-tier governance system are similar to general findings and assessments made with respect to this model in other legal orders. For both authors, the list of limitations include:

- information asymmetry to the disadvantage of the supervisory board and weak information flow between the management board and the supervisory board;
- insufficient commitment on the part of the supervisory board members with respect to performing their supervisory duties, as well as inadequate knowledge and experience needed to assure effective monitoring; and

---

<sup>712</sup> *ibid*; see also Oplustil & Radwan (n 7) 490-491.

<sup>713</sup> *ibid*.

<sup>714</sup> See, for example, Arcot, Bruno & Faure-Grimaud (n 31). See also section 'Comply or Else' Vs. 'Comply or Explain' in chapter III.

<sup>715</sup> Oplustil & Radwan (n 7) 480, referring to Klaus J. Hopt, 'The German Two-Tier Board: Experience, Theories, Reforms' in Klaus J. Hopt, Hideki Kanda, Mark J. Roe and Eddy Wymeersch (eds.) *Comparative Corporate Governance* (Oxford University Press 1998) 227.

- weak communication and insufficient co-operation between the supervisory board and external auditors.

Members of the supervisory board have limited access to information and need to depend on the management board as a source<sup>716</sup>. This escalates the risk of manipulation and filtering of information by the directors. In addition to that, the Company Code of 2000 lacks any provision that would oblige the management to periodically inform the supervisory board about entrepreneurial plans and their implementation.<sup>717</sup> In many cases, this means that the management board decides when and what information shall be given to the supervisory board. Furthermore, stringent devotion to the collegiality principle might have a negative impact on the efficiency of supervision, as it might limit the board's (re)actions and responses to destructive developments in the company's business.<sup>718</sup> The Company Code of 2000 does not provide individual supervisors with the right to request that directors present certain information or that reports be presented to the supervisory board at its next meeting<sup>719</sup>. As a final point, the Company Code is silent on board committees and co-operation between the supervisory board and external auditors. Article 86 of the Act of 29 May 2009 on Statutory Auditors provides for an obligation to create an audit committee in the supervisory board of companies – being the so called 'public-interest entities' – as well as regulates the tasks of this committee. However, if the supervisory board is composed of no more than five members (which is the minimum number of supervisory board members in a public company<sup>720</sup>) formation of an audit committee is not necessary and its tasks may be vested with the board as a whole.

According to PricewaterhouseCoopers<sup>721</sup>, the participation of women on supervisory boards of listed companies in Poland may need to be reviewed, as it is not high, amounting to only 14%.

---

<sup>716</sup> Oplustil & Radwan, *ibid.*

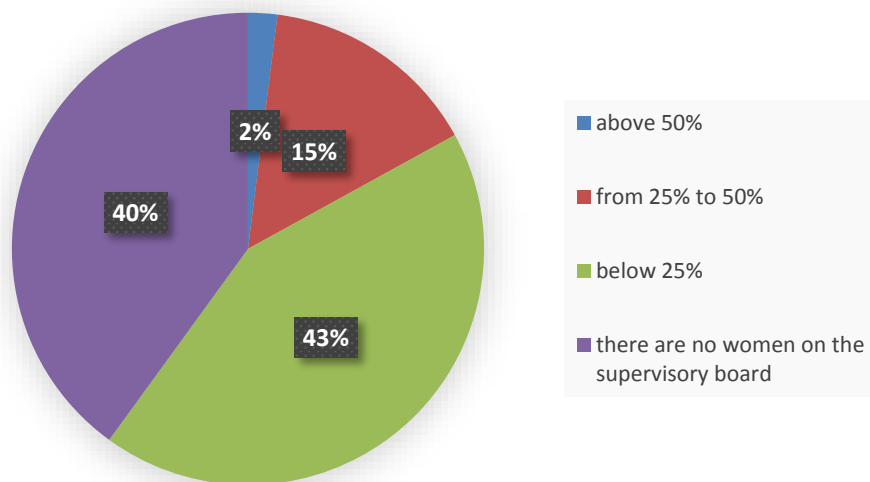
<sup>717</sup> cf, for example, sec. 90 (1) German *Aktiengesetz*.

<sup>718</sup> Oplustil & Radwan (n 7) 480.

<sup>719</sup> cf, for example, sec. 90 (3) German *Aktiengesetz*.

<sup>720</sup> Art. 385§1CCC. The regulation of Art. 86 of the Act of 29 May 2009 constitutes implementation of Art. 41 of Directive 2006/43/EC as amended by Directive 2014/56/EU on statutory audits of annual accounts and consolidated accounts.

<sup>721</sup> PwC, 'Rady Nadzorcze 2013. Skuteczność (...)' (n 539).



**Chart 1.** Participation of women on supervisory boards\* in Poland<sup>722</sup>

\* Research was conducted amongst all companies listed on the Warsaw Stock Exchange in March – April 2012.

Interestingly, the participation of women in supervisory boards is lower in companies with a foreign strategic investor than in companies with Polish capital. This difference is quite significant. In the first case, women constitute 11% of the board, in the latter – 15%.<sup>723</sup>

Women are also appointed as presidents of supervisory boards relatively less often than men<sup>724</sup>. Amongst all women who are members of supervisory boards only 8% hold the position of presidents, while the same proportion amongst men amounts to 16%. A slightly smaller disproportion in this area exists in companies that have the State Treasury as a dominant shareholder, where the number of presidents among women is 13%, and amongst men – 15%.<sup>725</sup>

## F. REMUNERATION POLICY

Similarly to the Anglo-American systems, the remuneration policy in Poland also needs to be reviewed. As I have mentioned in chapter IV (the section ‘Directors’ Performance and

<sup>722</sup> Deloitte Poland, ‘Raport „Współczesna Rada Nadzorcza 2012”. Praktyka Ładu Korporacyjnego’ (2012) <[www.gpw.pl/biblioteka-gpwwiecej?gpwl\\_id=84&title=Raport+%E2%80%99EWsp%C3%B3%C5%82czesna+Rada+Nadzorcza+2012%E2%80%9D+Praktyka+%C5%82adu+korporacyjnego+w+Polsce.>](http://www.gpw.pl/biblioteka-gpwwiecej?gpwl_id=84&title=Raport+%E2%80%99EWsp%C3%B3%C5%82czesna+Rada+Nadzorcza+2012%E2%80%9D+Praktyka+%C5%82adu+korporacyjnego+w+Polsce.>) accessed 16 June 2014.

<sup>723</sup> PwC, ‘Rady Nadzorcze 2013. Skuteczność (...)’ (n 539).

<sup>724</sup> *ibid.*

<sup>725</sup> *ibid.*

Remunerations'), some of my research participants found this issue to be a weakness of Polish corporate governance.

The Company Code of 2000 draws little attention to the issue of remuneration of board members. It provides that the supervisory board shall firstly set the remuneration of members of the management board employed under employment contracts or other contracts unless the statutes provide otherwise. Secondly, the shareholders' meeting may authorise the supervisory board to establish that the remuneration of members of the management board shall also include the right to participate, in a specified manner, in the company's annual profit allocated for distributions among the shareholders pursuant to Article 347§1<sup>726</sup>.<sup>727</sup> Thirdly, members of the supervisory board may receive remuneration. The amount of such remuneration shall be set forth in the statutes or a resolution of the shareholders' meeting. The remuneration in the form of a right to participate in the company's profit for a given financial year allocated for distribution among the shareholders in accordance with Article 347§1, shall only be granted by way of a resolution of the shareholders' meeting. Members of the supervisory board shall be entitled to reimbursement of costs incurred in connection with conducting the supervisory board's activities.<sup>728</sup>

All this refers to a JSC only. The Code does not regulate the issue of receiving remuneration by members of the management board, the supervisory board and the auditors' committee in an LLC. Legal doctrine is unanimous that a decision in this regard belongs to the shareholders of a company. They might decide that members of these organs work for free or receive remuneration. In fact, their appointment usually takes place on the strength of an employment contract, a contract of service or another obligation relationship, eg a managerial contract.<sup>729</sup> It is also possible to grant members of the supervisory board and the auditors' committee reimbursement of costs resulting from conducting the supervisory board's activities (eg transport or hotel costs)<sup>730</sup>.

The Company Code also neglects the issue of a remuneration committee within the supervisory board. A plausible explanation for this might be seen in the relatively small size of supervisory boards in Polish JSCs<sup>731</sup>. Taking into account that the Code does not provide for shareholders in most cases to participate in the process of remuneration, this might work to the detriment of companies. On the other hand, the weak separation of ownership and control in Polish companies creates the risk that actually the controlling shareholders will decide about

---

<sup>726</sup> Shareholders shall be entitled to participate in profit disclosed in the financial statements verified by a certified auditor and allocated by the shareholders' meeting for distribution to the shareholders.

<sup>727</sup> Art. 378CCC.

<sup>728</sup> Art. 392§1, 2 and 3CCC.

<sup>729</sup> See, for example, Kidyba, vol 1 (n 630) 932 – 933; Jacek Bieniak and others, *Kodeks Spółek Handlowych. Komentarz* (C.H. Beck 2011) 755, 815-816, 824, 1171.

<sup>730</sup> Kidyba, *ibid*; Bieniak, *ibid* 815-816, 824.

<sup>731</sup> Oplustil & Radwan (n 7) 491.

remuneration.

The Best Practices Code of 2010 draws even less attention to the issue of remuneration. The Code only requires that each listed company should have a remuneration policy and rules of defining the policy. The remuneration policy should in particular determine the form, structure, and level of remuneration of members of supervisory and management bodies. For details, it refers to Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC), and Commission Recommendation of 30 April 2009 complementing that Recommendation (2009/385/EC) fostering an appropriate regime for the remuneration of directors of listed companies. The absence of any material regulation on directors' remuneration in the Best Practices Code clearly deserves criticism.

Another alarming issue is a significant disproportion between the level of managerial remuneration and employee remuneration. On average, a person employed by a company earns annually PLN 48,213 million (GBP 8,586.52<sup>732</sup>) annually<sup>733</sup>, while an average salary of an executive director was PLN 1,75 million (GBP 311,667.24) annually in 2012 in WIG20 (this is 1,5 times more than in mWIG40 and almost twice as much as companies classified as sWIG80<sup>734</sup> (see Appendix 6)). Amongst the ten best paid presidents of management boards, annual pay in 2012 was between about PLN 3,4 million (GBP 534,999.07)<sup>735</sup> and about PLN 11,9 million (GBP 1,960.654.06)<sup>736</sup>.<sup>737</sup>

The disproportion in pay might have been a reason why companies did not inform the public about the size of remuneration. A significant step towards a change was the Commission Recommendation 2004/913/EC, instructing that shareholders should be provided with a clear and comprehensive overview of the company's remuneration policy<sup>738</sup>. It was adopted in the Regulation of the Minister of Finance of 19 February 2009 on the current and periodic disclosures to be made by issuers of securities (...), which imposed on listed companies the obligation to disclose information on directors' remuneration (for members of both the management and the supervisory boards). They are published yearly, together with the annual financial statements.<sup>739</sup> The law

---

<sup>732</sup> All amounts expressed in Polish złoty on this page were converted to British pounds according to the currency exchange rate on 25 March 2015.

<sup>733</sup> Główny Urząd Statystyczny [Central Statistical Office], 'Przeciętne zatrudnienie i wynagrodzenie w sektorze przedsiębiorstw w marcu 2014 r.' <[www.stat.gov.pl/obszary-tematyczne/praca-wynagrodzenia/zatrudnienie-wynagrodzenie/przecietne-zatrudnienie-i-wynagrodzenie-w-sektorze-przedsiębiorstw-w-marcu-2014-r-,3,24.html](http://www.stat.gov.pl/obszary-tematyczne/praca-wynagrodzenia/zatrudnienie-wynagrodzenie/przecietne-zatrudnienie-i-wynagrodzenie-w-sektorze-przedsiębiorstw-w-marcu-2014-r-,3,24.html)> accessed 12 May 2014.

<sup>734</sup> PricewaterhouseCoopers Poland, 'Wynagrodzenie prezesów według PwC' <<http://www.pwc.pl/pl/biuro-prasowe/wynagrodzenia-prezesow-wedlug-pwc.jhtml>> accessed 2 May 2014.

<sup>735</sup> Luigi Lovagio – bank Pekao S.A.

<sup>736</sup> Janusz Filipiak – IT company COMARCH S.A.

<sup>737</sup> PwC, 'Wynagrodzenie prezesów (...)' (n 734).

<sup>738</sup> Point 5 of 2004/913/EC.

<sup>739</sup> Regulation of the Minister of Finance of 19 February 2009 on the current and periodic disclosures to be made by issuers of securities and conditions for recognition as equivalent of information where disclosure is required under the laws of a non-member state; §95, sec. 6, point 17.

however, does not concern all companies, which might be reluctant to reveal such information.

## G. THE DISCLOSURE SYSTEM

In general, the disclosure system is a problematic aspect of Polish corporate law.

The Best Practices Code of 2010 for management boards of listed companies provides that a company should pursue a transparent and effective information policy using both traditional methods and modern technologies, as well as the latest communication tools to ensure fast, secure and effective access to information<sup>740</sup>. The Code opens with an extensive list of information and documents to be made available on the company's website which (as of 1 January 2009 shall also be published in English)<sup>741</sup>. This includes basic corporate regulations, in particular the statutes and internal regulations of its governing bodies; professional CVs of the members of its governing bodies; information about the participation of women and men respectively in the management board and in the supervisory board of the company, current and periodic reports, etc.

In the Company Code of 2000 the issue of transparency is regulated superficially. Copies of the management board report on the company's operations, the financial statements, the supervisory board report and the opinion of a certified auditor shall be issued to the shareholders at their request, no later than fifteen days prior to the date of the shareholders' meeting<sup>742</sup>. Shareholders may inspect the minutes' book (an excerpt from the minutes including evidence of convening the shareholders' meeting and powers of attorney granted by shareholders) and request the issue of copies of resolutions certified by the management board (this also includes a resolution of the shareholders' meeting approving the company's operations and financial statements for the previous financial year)<sup>743</sup>.

On the other hand, the Company Code of 2000 gives to each shareholder of an LLC a unique right to individual control. For the purpose of exercising it, a shareholder or a shareholder acting jointly with a person authorised by him or her may, at any time, inspect the books and documents of the company, prepare a balance sheet for his or her personal use or request the management board to provide explanations.<sup>744</sup> This right is not given to JSCs. In return shareholders and third persons may exercise control over these documents through their websites. The Code foists an

---

<sup>740</sup> Part I, point 1.

<sup>741</sup> Part II, point 1.

<sup>742</sup> Art. 395§2 and 4 CCC, and Art. 421§1 and 3 CCC; with respect to LLCs – Art. 248§1 and 4 CCC.

<sup>743</sup> Art. 421§1 and 3 CCC.

<sup>744</sup> Art. 212§1 and 4 CCC. According to Art. 248§1CCC, resolutions of the shareholders' meeting shall be recorded in the minutes' book and signed by all persons present or at least by the chairman and the minutes clerk. Where the minutes are taken by a notary, the management board shall file an excerpt from the minutes' book.

obligation of having a website on public companies (listed JSCs). They shall place there *inter alia* documentation that is to be presented to the shareholders' meeting and draft resolutions.<sup>745</sup>

The generally weak disclosure of information might significantly influence the ownership structure of companies. Thus, the question remains as to whether some of those issues should or should not be included within the universally binding Company Code of 2000.

## H. CONCLUSIONS

The theme of this chapter is corporate governance in Poland. I analyse its main aspects, referring to the equivalents from the American and British corporate governance system. The goal of this chapter is to answer my two first research questions:

- What are the weaknesses of the Polish corporate governance system?
- What changes should be made to corporate governance in Poland?

In sections B and C, I present the outline of Polish corporate governance and the consolidated ownership structure of Polish companies, which is considered the greatest weakness of the Polish corporate system. Therefore, in section D, I continue this topic, analysing the reasons for the concentration of control and its maintenance in Polish companies.

Section E of this chapter is dedicated to the internal system and distribution of power in Polish companies. It is split into the following subsections: the management board, directors' duties, the shareholders' meeting, the supervisory board, the independence of supervisors and the other board issues. In the latter one, I elaborate on such issues as, *inter alia*, the information flow between corporate authorities in Poland and board committees in Polish companies.

In sections F and G, I deal with the issue of remuneration for corporate officials, the disclosure thereof in annual reports and other matters pertaining to Polish corporate governance.

All above-mentioned issues are developed in greater detail in chapter VI.

---

<sup>745</sup> Art. 402<sup>3</sup>§1 CCC.

## VI. ANALYSIS OF INTERVIEWS

### A. INTRODUCTION

This chapter is an analysis of interviews conducted in Poland with representatives of the business environment (see chapter II, in which I explain the process of conducting these interviews). It deals with such problematic issues of corporate governance in Poland as, for example, the high concentration of share ownership and control, the extended power of the supervisory board or the poor remuneration policy, which have already been discussed in the previous chapter. The goal of this chapter is to develop the discussion and present the views of business practitioners on corporate governance in Poland, their proposals of changes to the way in which companies are managed in Poland, as well as their opinion on the possible hybridisation of Polish corporate governance, eg the implementation of the one-tier board system in Poland. Thus, this chapter aims to answer all my three research questions:

- What are the weaknesses of the Polish corporate governance system?
- What changes should be made to corporate governance in Poland?

and above all:

- Is hybrid corporate governance a realistic choice for Poland?

This chapter is mainly based on the talks conducted with interviewees, but I also refer to relevant literature and legislation to contextualise the comments made and to develop my discussion on hybrid corporate governance. However, contrary to the previous chapter, I elaborate on certain issues in greater detail, eg employees' participation in corporate governance in Poland. The reason for this elaboration is that I did not want to place too much information in one chapter. I also italicised text that concerns the most essential findings collected during the interviews.

In keeping with the previous chapters, I refer to the foreign systems of corporate governance. However, this chapter includes a significant amount of calculable data, collected during interviews. I converted this data into graph/chart form, the aim being to give an approximate illustration of certain tendencies in thinking within Polish corporate governance. This data is presented in percentages, which, I believe, facilitates a better understanding of those tendencies. This chapter also contains several graphs/charts copied from business reports. They perform a similar role as the other figures, namely, they illustrate certain occurrences within corporate governance in Poland.



With respect to the data analysis of interviews and the presentation of that data, instead of analysing each interview separately, I organised this chapter into specific sections that group relevant subject matter together. Whilst at the same time presenting and analysing the most valued interviewee opinions for this research project.

As each unstructured interview started with questions concerning the consolidated ownership and control of Polish companies, the subsequent subsection is also dedicated to this issue.

## **B. CONCENTRATED OWNERSHIP AND CONTROL IN POLAND**

I began the interviews with questions regarding the highly concentrated ownership and control in companies in Poland, as the literature identifies this as a significant problem of Polish corporate governance (see chapter V). However, in order not to impose my viewpoint on participants, I asked the following questions:

- **What do you think of the ownership structure of limited companies in Poland? The ownership structure of companies in some countries is more dispersed than in Poland. For example, the number of shares held by one shareholder in the US and the UK amounts to below 2%<sup>746</sup>, while in Poland, on average, it is about 40%<sup>747</sup>** (as I assumed that participants' knowledge on foreign corporate systems might be low, the question was followed by a brief explanation).
- **What are reasons for the high concentration of corporate ownership in Poland?**

Out of 37 participants, 14 did not answer this question. They received a questionnaire to complete, and left this question blank<sup>748</sup>.

23 participants (nine of whom participated in the interviews by responding to a questionnaire and 14 by taking part in unstructured interviews; see chapter II – 'Research Methodology', where I explain in detail the process of collecting data during interviews) also believe that consolidated ownership in Poland works to the detriment of a company. In their opinion, it results in the expropriation of returns by controlling shareholders, and, as a consequence, creates conflicts between minority shareholders and controlling shareholders in Polish companies.

---

<sup>746</sup> Morck & Steier (n 25).

<sup>747</sup> See section 'The Ownership Structure' in chapter V.

<sup>748</sup> In general, 23 participants took part in my structured interviews. They received a questionnaire and were asked to justify their answers. For further explanation see section 'Data Collection' in chapter II – 'Research Methodology'.

According to participants, some of the main reasons for the consolidated ownership structure include: cross-shareholding, takeovers and privatisation procedures and promoting the insider type of ownership.

Privatisation as a factor of the highly consolidated ownership was mentioned by 18 participants, out of whom eight run a small business (five sole entrepreneurships and three professional partnerships), and the remaining ten were either presidents of management boards or presidents of supervisory boards (six in total; out of whom two were former presidents of management boards in companies subject to privatisation), or shareholders of limited companies (two out of whom hold shares in a formerly privatised company). One reason why privatisation was often mentioned by participants might be the fact that it has been subject to several scandals in Poland<sup>749</sup>.

State-owned enterprises (SOEs) have been privatised since the early 1990s. This process has embraced 8,453 Polish enterprises<sup>750</sup>. It should be added that in the early 1990s, the state sector was mainly made of these enterprises, which produced 80% of national output, were technologically out-of-date, and excessively large; only 300 of the largest enterprises accounted for 59% of the net income of Poland's 3,177 state industrial enterprises<sup>751</sup>.

The Act of 30 August 1996 on Commercialisation and Privatisation of State-Owned Enterprises came into effect in April 1997 (the Privatisation Act)<sup>752</sup>. The law distinguishes two basic privatisation methods: indirect and direct<sup>753</sup>.

The indirect method consists of two stages. First of all, an SOE is commercialised – it changes its legal form and is transformed into a company, where 100% of shares belong to the State Treasury<sup>754</sup>. From this moment on, an SOE (the so-called sole-shareholder company of the State Treasury) begins to operate under provisions of the Company Code<sup>755</sup>. At the second stage, the sale of the shares takes place in a number of ways: public offering, sale to a strategic investor (or

---

<sup>749</sup> See for example Krzysztof Losz, 'Historia Prywatyzacji Polskiego Przemysłu' *Nasz Dziennik* (15-16 września 2012) <[www.naszdziennik.pl/wp/9986,historia-prywatyzacji-polskiego-przemyslu.html](http://www.naszdziennik.pl/wp/9986,historia-prywatyzacji-polskiego-przemyslu.html)> accessed 17 April 2014; Jacek Tittenbrum, *Z Deszczu pod Rynnę. Meandry Polskiej Prywatyzacji*, vol 1-4 (Zysk i S-KA 2007).

<sup>750</sup> Ministry of Treasury Republic of Poland, 'Statistics. Ownership Transformation' (18 February 2013) <[www.msp.gov.pl/en/privatisation/statistics/3967,Ownership-transformation.html](http://www.msp.gov.pl/en/privatisation/statistics/3967,Ownership-transformation.html)> accessed 25 May 2014.

<sup>751</sup> Rondinelli & Yurkiewicz (n 12).

<sup>752</sup> Prior to that, the Act of 13 July 1990 on Privatisation of State-Owned Enterprises had been in force.

<sup>753</sup> Another method of privatisation was provided by Art. 19 of the Act of 25 September 1981 on State-Owned Enterprises. It applies to SOEs in financial distress — the enterprise is liquidated and its assets are sold out. Some enterprises in agricultural sector are privatised according to the principles provided by the Act of 19 October 1991 on Management of Agriculture Property of the Treasury. There are also separate acts devoted to ownership transformation of certain enterprises and sectors of the economy.

<sup>754</sup> Art. 1 sec. 1 of the Privatisation Act.

<sup>755</sup> Art. 5 sec. 1 of the Privatisation Act. The operation under the Company Code of 2000 is common to all limited companies and partnerships, except a civil partnership. The other entities, including SOEs, are governed by other legal acts; see Appendix 3.

combination of these two) and inclusion to the National Investment Fund programme<sup>756</sup>.

The Act on National Investment Funds (NIF) was adopted on 30 April 1993, introducing a kind of mass privatisation programme. NIFs received blocks of shares of 512 companies undergoing mass privatisation, and Polish citizens received a kind of voucher that they could invest in the NIFs<sup>757</sup>. The NIF programme was supposed to accelerate the pace of privatisation, at the same time providing for restructuring of companies, facilitated by the experience of professional management companies employed by the NIFs<sup>758</sup>.

The direct method consists of liquidation of an SOE in a legal sense; then, the assets of the enterprise (in totality or divided into separated organised parts) are privatised in one of the three possible ways:

- sale;
- entering as a contribution in kind into a company established by the Treasury and a private investor;
- leasing (employee buy-out)<sup>759 760</sup>.

According to Kozarzewski<sup>761</sup>, 'Polish privatisation law is much diversified, if not to say eclectic.' It represents a certain compromise between two main options: 'liberal conceptions patterned after solutions adopted in developed Capitalist countries, and a participatory approach originating from the Polish labour self-management movement and tending towards a kind of 'third road' of development through building of the so-called 'social market economy'<sup>762</sup>. A former president of a management board<sup>763</sup> (see section 'Ethics in Research on Corporate Governance' in chapter II, in which I explain that, under Anglia Ruskin University research policy, I was obliged to assure anonymity and confidentiality to my research participants) said that *provisions of the law*

---

<sup>756</sup> Art. 1 sec. 2 and Art. 33 sec. 1 of the Privatisation Act.

<sup>757</sup> Barbara Błaszczyk, Iraj Hoshi and Richard Woodward (eds), *Secondary Privatisation in Transition Economies: The Evolution of Enterprise Ownership in the Czech Republic, Poland and Slovenia* (Palgrave Macmillan 2003) 123.

<sup>758</sup> *ibid.*

<sup>759</sup> Art. 1 sec. 2 and Art. 39 sec. 1 of the Privatisation Act.

<sup>760</sup> For details see, for example, Rondinelli & Yurkiewicz (n 12).

<sup>761</sup> Kozarzewski (n 14).

<sup>762</sup> The emergence of the Solidarity trade union and mass protest actions, and deep economic crisis in the early 1980s made possible a deeper reform of SOEs through their decentralisation. As a consequence, the Act on State-Owned Enterprises and the Act on Employee Self-Management in State-Owned Enterprises, both passed on 25 September 1981 (still valid for state-owned enterprises) made employees accountable for supervision over the entire activity of SOEs (Art. 28 of the Employee Self-Management Act) and dealing with strategic decisions. For further explanation see Piotr Kozarzewski, 'Corporate Governance: Formation in Poland, Kyrgyzstan, Russia and Ukraine' (Centre for Social and Economic Research, Studies & Analyses CASE 347, Warsaw 2007) <[www.case.com.pl/upload/publikacja\\_plik/20444565\\_sa347.pdf](http://www.case.com.pl/upload/publikacja_plik/20444565_sa347.pdf)> accessed 3 July 2011; Piotr Kozarzewski, 'Corporate Governance in State-Controlled Enterprises in Poland' (2007) <[www.politologia.wsb-nlu.edu.pl/uploadedFiles/file/P%20Kozarzewski%20-%20CORPORATE%20GOVERNANCE%20IN%20STATE-CONTROLLED.pdf](http://www.politologia.wsb-nlu.edu.pl/uploadedFiles/file/P%20Kozarzewski%20-%20CORPORATE%20GOVERNANCE%20IN%20STATE-CONTROLLED.pdf)> accessed 10 July 2011.

<sup>763</sup> Text to n 529; this is a president of a JSC that was formerly privatised through the indirect method.

*were also intended to overcome the assumed resistance of insiders.*

Until 1997, the leasing path of direct privatisation preferred extremely insiderised patterns of ownership structure: the new company should have been founded by the majority of employees, no institutional outsiders were permitted (unless accepted by the Ministry of Ownership Transformation)<sup>764</sup>. According to the 1990 Act, in indirect (capital) privatisation employees had a right to acquire 10% of shares at reduced price<sup>765</sup>; these preferences were increased by the 1996 Act which granted insiders a right to acquire 15% of shares for free. Another 15% can be received for free by farmers and fishermen if they were suppliers of the former SOE (with restrictions regarding the volume of supplies).<sup>766</sup>

In addition, the new Act lifted the requirement that sole-shareholder companies of the Treasury should be privatised within two years of commercialisation<sup>767</sup>. It introduced a legal background for impeding ownership transformation in this group of companies<sup>768</sup>.

Finally, preventing further ownership transformation became beneficial for governmental officials. A president of a management board<sup>769</sup> said that *such economic favours as undervaluation of capital assets, credit preferences or concessions for certain activities might have been traded for positions on management boards or even ownership interests in privatised companies, which became common practice.*

Other than privatisation, often mentioned by the participants, additional reasons for the high consolidation of ownership and control in companies in Poland were cross-shareholding (12 participants) and takeovers (nine participants). Only one participant – a minority shareholder<sup>770</sup> drew attention to *non-voting and preferred shares*, which – in the participant's opinion – *are going to replace the application of Art. 354 of the Company Code of 2000 (golden shares<sup>771</sup>)*. *'The politics*

---

<sup>764</sup> The Act of 1996 imposes certain limits on the use of direct privatisation paths and the role of insiders in ownership transformation. Limits have been set on the size of enterprises (in terms of employment level, assets and turnover); outsiders gained a right to take the initiative in privatisation without the prior consent of insiders; in leasing path, at least 20% of shares in the new company must be in the hands of outsiders; possibilities of participation of legal persons have been increased.

<sup>765</sup> Text to n 752.

<sup>766</sup> Art. 36 sec. 1 and Art. 37 sec 1 of the Privatisation Act.

<sup>767</sup> Text to n 752.

<sup>768</sup> Kozarzewski, 'Corporate Governance in State-Controlled Enterprises in Poland' (n 762).

<sup>769</sup> Text to n 763. Similarly Kazimierz Z. Poznanski, 'Privatisation of the Polish Economy: Problems of Transition' (1992) 44 (4) Soviet Studies <<http://www.jstor.org/stable/152201>> accessed 2 July 2011.

<sup>770</sup> Employed by a JSC, and interviewed in August 2013.

<sup>771</sup> In the EU, golden shares have been ruled illegal; see, for example, European Commission, 'Selected Jurisprudence of the Court of Justice of the European Union on the Free Movement of Capital' <[www.ec.europa.eu/internal\\_market/capital/framework/court/index\\_en.htm](http://www.ec.europa.eu/internal_market/capital/framework/court/index_en.htm)> accessed 24 July 2014. The Polish Company Code of 2000, which must comply with the EU jurisprudence, contains a provision that creates a ban on golden shares. According to Art. 20, shareholders should be treated equally in the same circumstances. Nevertheless, some personal rights may be conferred upon an individual shareholder in a JSC in Poland, in particular the authorisation to appoint or remove members of the board of directors or the supervisory board, or entitle such a shareholder to receive specific distributions from the company (Art. 354CCC). The statutes of a

*of their distribution will allow, amongst other things, the Treasury to retain its dominant position in companies subject to privatisation’ – added the participant.*

Another board member<sup>772</sup> said: *‘Non-voting shares are so destructive yet so rewarding for a company. They give governors a greater flexibility in the process of decision-making, which facilitates costly and long-term investments. But, they might also be used as a tool that leverages control in a company – exactly like takeovers, super majorities, ‘squeeze out’<sup>[773]</sup>, etc.’<sup>774</sup>*

A survey, carried out by Dzierżanowski and Tamowicz<sup>775</sup>, provides that only up to 20% of public companies could be threatened by hostile takeovers, a fact which stems from the concentration of ownership and control<sup>776</sup>. Moreover, the WSE has not been the scene of large takeover battles so far<sup>777</sup>. A president of a management board<sup>778</sup> noted that *takeovers and mergers in most cases had had an amicable character.*

## C. THE SUPERVISORY BOARD IN POLAND

The literature review I carried out (see section ‘The Inside Structure and Distribution of Powers’ in chapter V – ‘Corporate Governance in Poland’), as well as the two pilot interviews<sup>779</sup> (see section ‘Data Collection’ in chapter II – ‘Research Methodology’), drew my attention to the issue of distribution of power between corporate bodies in Poland. I asked my research participants to

---

company in which the State Treasury is a shareholder may also stipulate special rights attached to the shares held by the State Treasury in terms of votes (more than two, no more than five votes; Art. 625CCC). Furthermore, the Act of 3 June 2005 on Special Rights of the State Treasury and on Their Execution in Capital Companies of Material Significance for the Public Order and the Public Safety provides the State Treasury with special rights over a number of companies that are considered materially significant for public order and security. These rights include, *inter alia*, the right to oppose the shareholders’ meeting resolution or an action of the management board in specific matters that are essential for the existence and functioning of the company, such as winding-up the company, transferring the company’s seat abroad, a change in the company’s operations (the scope or object of business activity) as laid down in the statutes, as well as disposing, leasing, pledging and creating usufruct on its organised assets. Before 2010, the State Treasury, in companies in which the Treasury is a shareholder, was given the right to oppose resolutions of the shareholders in the most strategic for a company’s operation cases.

<sup>772</sup> A member of the management board of a JSC, interviewed in November 2013.

<sup>773</sup> Under Art. 418CCC, the general meeting may adopt a resolution on the compulsory buyout of shares held by shareholders representing no more than 5% of the share capital (minority shareholders) by no more than five shareholders holding, in aggregate, no less than 95% of the share capital, each of whom holds no less than 5% of the share capital. The adoption of such resolution shall require a majority of 95% of votes cast. The statutes may provide more stringent conditions for adopting such resolution.

<sup>774</sup> Non-voting shares also entitle their holder to a higher dividend (Art. 353CCC).

<sup>775</sup> Dzierżanowski & Tamowicz (n 8). The estimation, however, does not take into account voting caps or other statutory provisions.

<sup>776</sup> For more information on takeovers see, for example, Oplustil & Radwan (n 7) 458-460.

<sup>777</sup> Dzierżanowski & Tamowicz (n 8).

<sup>778</sup> Text to n 763.

<sup>779</sup> Text to n 529.

express their opinion about the scope of power of supervisory boards in Poland.

## 1. The scope of power

I asked the following question:

**Does the supervisory board in Poland hold more power than the management board? Please justify your answer.**

17 participants (out of 37 who took part in this research project) answered my question. The other 20 participants, responding by my questionnaire, left the question blank<sup>780</sup>.

Those participants who answered my question were either, participated in my research by e-mail, Skype or face to face, board members (three presidents and two vice-presidents of management boards, four presidents of supervisory boards, three members of management boards and two members of supervisory boards) or minority shareholders (three shareholders of a JSC), who took part in my structured interviews (responding by a questionnaire; for further explanation see chapter II – ‘Research Methodology’ – ‘Data Collection’, in which I explain the process of interviewing).

For the majority of the board members (13 out of 14), *the power between corporate organs is well-balanced, and the supervisory board does not have a supreme position over the management board*. In general, they justified their answers as follows:

- *Law prohibits supervisors from giving binding instructions to the management board concerning the management of the company's affairs.*
- *The statutes may provide for the obligation to obtain the consent of the supervisory board to perform a specific action, but only for important reasons.*
- *Where the supervisory board refuses to give consent, the management board may request the general meeting to adopt a resolution permitting the performance of such action.*
- *Members of the supervisory board can be brought to justice for any damage inflicted through negligence or an action that is contrary to the provisions of law or the statutes unless no fault is attributable to them.*

Filing a suit against the officers requires prior approval by the shareholders' meeting, but

---

<sup>780</sup> Text to n 748.

the legislator rejected the use of quorum and thresholds<sup>781</sup>. In practice however, the significance of the shareholders' remedy in Polish corporate practice is rather minimal. One shareholder<sup>782</sup> stated that:

*'[i]t relies heavily on access to information. In this context there seems to be an apparent deficit in the regulatory framework on shareholder's information rights in an LLC, namely a shareholder's individual right to control company's affairs<sup>[783]</sup> may be excluded if the company establishes a supervisory board or auditors committee<sup>[784]</sup>. This might lead to the establishment of 'pseudo' board solely to frustrate shareholder access to information.'*

In this respect, Oplustil and Radwan<sup>785</sup> suggest that the minority in an LLC could file a motion to appoint a special purpose auditor<sup>786</sup>. For this motion to be effective, a quorum requirement of one-tenth of the share capital needs to be met. A corresponding right is provided for shareholders of public (listed) companies whenever they reach a threshold of 5% of total votes<sup>787</sup>. 'It follows (...) that [,] for a joint-stock, non-listed company there is no such minority right protection, which comes [as a] surprise and might be seen as a regulatory gap' – they conclude.<sup>788</sup>

Finally, a few participants (three shareholders and one board member) said that *the relations between the supervisory board and the management board in Polish companies may actually depart from the pattern provided by law*. One of them<sup>789</sup> expressed an opinion that *members of the management board perform de facto instructions of the majority shareholder*. 'An organ that kind of coordinates the dependence is the supervisory board, which is usually appointed by the controlling shareholders' – the shareholder<sup>790</sup> added. Another participant<sup>791</sup> said that *it might result in outside investors never receiving returns on their investments, because the controlling shareholders, alongside the supervisors and directors, would expropriate them*. According to this participant, *this happens in a number of ways*:

- *'the insiders simply steal the profits;*
- *the insiders sell the output, the assets, or the additional securities in the company that they*

---

<sup>781</sup> Art. 393 (2)CCCC (for a JSC) and 228 (2)CCC (for an LLC).

<sup>782</sup> A minority shareholder of a JSC, interviewed in January 2014.

<sup>783</sup> See Art. 212CCC.

<sup>784</sup> Art. 213§3CCC.

<sup>785</sup> Oplustil & Radwan (n 7) 486.

<sup>786</sup> See Art. 223CCC.

<sup>787</sup> See Art. 84–85 of the Act on Public Offering (...) and Public Companies.

<sup>788</sup> Oplustil & Radwan (n 7) 487.

<sup>789</sup> Text to n 770.

<sup>790</sup> *ibid.*

<sup>791</sup> A member of the management board of a JSC, interviewed in November 2013.

*control to another company that they own at below market prices (transfer pricing, asset stripping, and investor dilution, though often legal, have largely the same effect as theft);*

- *expropriation takes the form of diversion of corporate opportunities from the company, overpaying executives, or installing themselves or possibly unqualified family members in managerial positions.'*

*'Again, the Company Code of 2000 provides us with a legal basis to take a legal action against those who act dishonestly, but this needs to be proved. These are usually well-covered frauds' – another participant declared*<sup>792</sup>.

One board member<sup>793</sup> said the following: *'There is a strong connection between the Code provisions and the ownership structure of Polish companies. The owners keep it consolidated because it provides them with additional benefits.'*

In other countries, a similar problem is being resolved by means of independent directors<sup>794</sup>. In Poland, the institution of independent supervisors was introduced in 2002 (see chapter V). I asked my interviewees whether the appointment of independent supervisors has had any impact on the performance of corporate boards in Poland.

## 2. The independence of supervisors

The issue of independence drew a lot of participants' attention, as 39 participants answered my questions concerning it. This number includes persons who resigned from participating in this research, but partially filled my questionnaire (see chapter II – 'Research Methodology', where I analyse the process of collecting data during this research).

My questions were as follows:

- **Has the appointment of independent supervisors made any difference to corporate governance in Poland?**
- **How many independent supervisors should supervisory boards be composed of?**
- **What do you think of regulating this issue statutorily rather than leaving it as an optional best practice?**

**Please justify your answers.**

---

<sup>792</sup> One minority shareholder – text to n 782.

<sup>793</sup> One management board member – text to n 791.

<sup>794</sup> See, for example, Mallin (n 27) 26-66.



All the interviewees<sup>795</sup> unanimously answered that *the independence of supervisors had provided objective criticism to supervisory boards*. One management board president<sup>796</sup> gave the following detailed description on the role of independent supervisors in Poland:

*‘Independent supervisors are capable of seeing company and business issues in a broad perspective. Nonetheless, they are usually appointed because they have a breadth of experience, are of an appropriate calibre and have particular personal qualities. Additionally, they might have some specialist knowledge that will help provide the company with valuable insights or perhaps, key contacts in related industries. Of the utmost importance is their independence of the management of the company and any of its ‘interested parties’. This means that they can bring a degree of objectivity to the board’s deliberations, and play a valuable role in monitoring executive management.’*

However, the appointment of independent supervisors also requires the attention of shareholders. In one shareholder’s<sup>797</sup> opinion, *‘they need to be constantly looking ahead to ensure that supervisors have the required skills and experience to drive best performance.’*

Another shareholder<sup>798</sup> believes that *‘the involvement of independent supervisors in setting remuneration for members of the management board will eliminate the excessive remuneration contracts for directors.’*

Despite the consensus regarding the institution of independent supervisors, there was some disagreement among participants about the quantity of independent supervisors that should be appointed to the supervisory board.

Over half of the interviewees acknowledged that the current regulation of the Best Practices Code was satisfactory for them (see Chart 2 below). The current Code requires the participation of at least two independent members of the supervisory board regardless of the ownership structure of a company (an empirical study<sup>799</sup> from 2012 reveals that almost 56% of companies examined are composed of no more than six members). According to one supervisory board president<sup>800</sup>, *persons who maintain business relationships with a company should also perform the function of a supervisor. ‘We always care more about a business in which we are*

---

<sup>795</sup> All 14 board members and two shareholders justified their answers with respect to the first question.

<sup>796</sup> Employed by a JSC, and interviewed in November 2013. cf Roberto Mura, ‘Firm Performance: Do Non-executive Directors Have Minds of Their Own? Evidence from UK Panel Data’ (2007) 36 (3) Financial Management 81, in which Mura analyses the outcome of various surveys on the relationship between the presence of independent directors in management and company performance.

<sup>797</sup> A minority shareholder of an LLC, interviewed in May 2014.

<sup>798</sup> A minority shareholder of a JSC, interviewed in May 2014.

<sup>799</sup> Deloitte Poland, ‘Raport „Współczesna Rada Nadzorcza 2012” (...)’ (n 722).

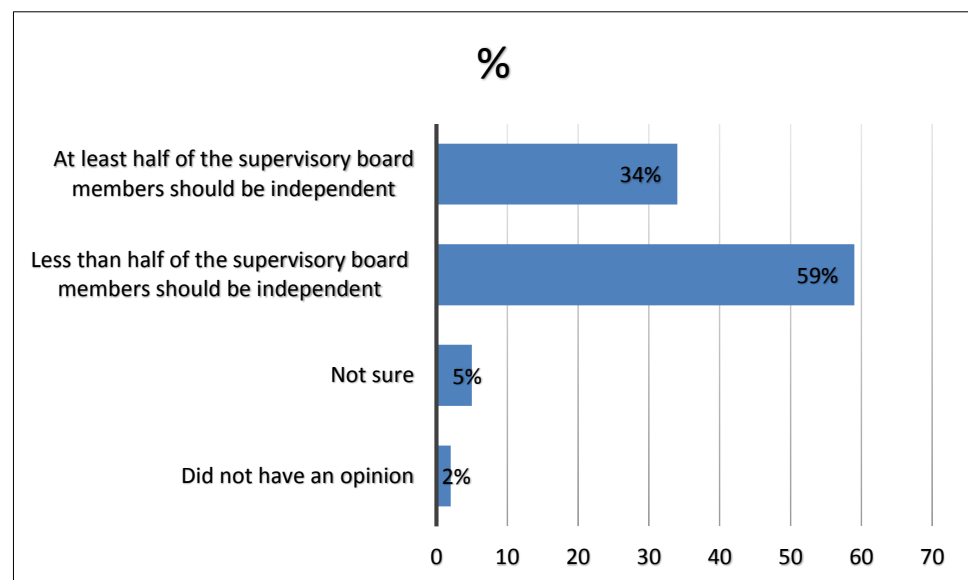
<sup>800</sup> Employed by a JSC, and interviewed in March 2014.

*invested'* – the board president said.

A significant number of the participants (mainly shareholders and employees) were of the opinion that *at least half the supervisors should be required to be independent* (see Chart 2 below). This however, might have partially been caused by the fact that I attached a brief description to my question, in which I referred to the requirements of the UK Corporate Governance concerning non-executive directors.

As a matter of fact, *there has been a deficit of persons on the market who could be appointed as independent supervisors*. This is an opinion expressed by one participant<sup>801</sup>.

Finally, three sole entrepreneurs stated that *all members of the supervisory board should be independent*. Out of the 39 participants, two (employees) were not sure how many independent supervisors should be involved in the works of the supervisory board, and one participant (one sole entrepreneur) did not have any opinion about the issue.



**Chart 2.** Opinions on the independence of supervisory board members in Poland

Out of 39 participants, only four (the same participants turned out to be the supporters of implementing the one-tier board system in Poland; see section below) declared that *some thought should be given to the possibility of including the independence principle in the Company Code*. 13 board members justified their opinion by arguing that *companies should decide about their internal matters by themselves, and that the liberalisation of corporate law works towards further development of Polish market*. Nine other participants gave the same explanation. The others left their question forms blank.

In fact, the Code of Best Practices of 2002 required at least half of the supervisory board

<sup>801</sup> A vice-president of the management board of an LLC, interviewed in January 2014.

members to be independent members<sup>802</sup>. It was described as an ‘attempt to transplant the Anglo-Saxon concept of independent directors into the Polish system’<sup>803</sup>.

As I have already pointed out, the Polish legislative body has also taken into account the possibility of implementation of a one-tier board system in Poland, although eventually the idea collapsed (see section ‘Hybrid Corporate Governance in Poland’ in chapter III – ‘Literature Review’). A unitary model is available to European Companies (*Societas Europaea*; SE) with a registered office in Poland, but it is not suitable for all business participants in Poland. This business form is designed for large companies (the minimum subscribed capital of the SE is EUR 120,000), which are already operating in more than one Member State<sup>804</sup>. All this led to the development of my next question.

## D. THE ONE-TIER BOARD SYSTEM IN POLAND

I asked the participants what they thought of implementing a one-tier board system as an alternative model of corporate governance in Poland:

**What do you think of including the right to opt for a one-tier or a two-tier corporate governance model in the Company Code? Please justify your answer.**

The two-tier board model has operated in Poland since the end of the 19th century (except the period 1945-1989, when it was not practically in use) as the only eligible system<sup>805</sup>. Thus, for the majority<sup>806</sup> of my interviewees, this is the only well-known and therefore credible mechanism that Polish business people can use to conduct their affairs.

Out of 37 participants, 13 participants were pessimistic about the possibility of the implementation of a new corporate governance model, even if the law should allow for choice in corporate self-governance. However, it should be emphasised that only four participants were definitely against the concept of an alternative corporate governance system in Poland. Four

---

<sup>802</sup> Detailed criteria of what constitutes independence were to be laid down in a company’s articles/statutes.

<sup>803</sup> Oplustil & Radwan (n 7) 490.

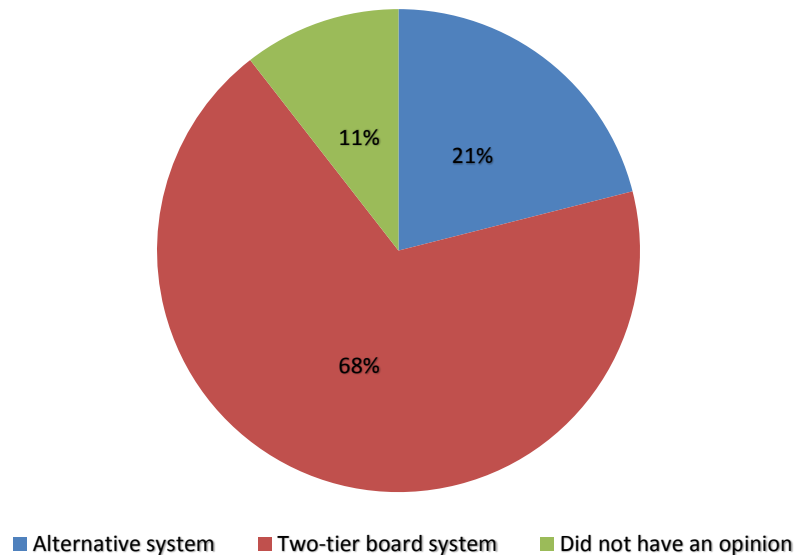
<sup>804</sup> Companies indicated the following reasons for a limited interest in an European Company: the absence of a truly unified legal regime for an SE, a lack of harmonisation in many areas of law with respect to an SE (eg specific requirements in the banking or insurance sectors, tax legislation), the complex and long negotiation process for employee participation, a lack of tax incentives; Commission of the European Communities, ‘Commission Staff Working Document. Impact Assessment on the Directive on the Cross-Border Transfer of Registered Office’ (Brussels, 2007) <[www.ec.europa.eu/internal\\_market/company/docs/shareholders/ia\\_transfer\\_122007\\_part1\\_en.pdf](http://www.ec.europa.eu/internal_market/company/docs/shareholders/ia_transfer_122007_part1_en.pdf)> accessed 23 July 2014; see also the Statute for a European Company (SE).

<sup>805</sup> For further explanation see, for example, Poznanski (n 769).

<sup>806</sup> Two of the participants have worked in corporate governance in the US.

participants were enthusiastic about this concept.

In total, 19 participants (out of the 37 who were interviewed) answered my question concerning a one-tier board model in Poland, of whom, two had no opinion about this issue. The remaining 18 participants, who did not respond to my question, participated in the interviews by responding to my questionnaire. They left this question blank.



**Chart 3.** Opinions on the possibility of implementing an alternative board system in Poland

The following participants were the advocates of the idea of an alternative board model in Poland: one management board member, one employee of a legal firm (a corporate lawyer), with whom I discussed particular issues by e-mail, Skype or face to face, and two shareholders, who took part in my research by responding my questionnaire (for more information about the process of data collection during the interviews, see chapter III – ‘Research Methodology’). They all justified their answers.

One of the shareholders<sup>807</sup> said that a one-tier system is more efficient in cases where the company has a majority or prevailing shareholder (insider system): *‘The combination of supervisory and management function suggests the advantage of no real conflict between the shareholders and the board. With a unitary system, the goals and objectives of such companies are largely defined by the majority shareholder, and thus bring about more efficient and faster decision-making’<sup>808</sup>. So, the unitary board might result in a closer relation and better information flow between the supervisory and managerial bodies. ‘With fewer organisational layers, the one-tier model might create fewer information asymmetries and alleviate bureaucratic hurdles that might hamper the decision-making*

---

<sup>807</sup> Text to n 770.

<sup>808</sup> *ibid.*

*process of non-executive directors on two-tier boards’ – the shareholder declared<sup>809</sup>.*

I repeated this opinion to all board members. In response, one board member<sup>810</sup> stated the following: *‘It works on condition that the board is not composed of the controlling shareholder or that its members are not dependent on the controlling shareholder, which can happen in Poland. However, I have to admit that the board model speeds up the decision-making process considerably.’*

It is worth noting that both participants have some international work experience in company management, including work for companies set up in Anglo-Saxon countries<sup>811</sup>.

The majority of the other participants did not agree with them on the issue of implementing a one-tier board system in Poland. One shareholder<sup>812</sup> believes that *the fact that executive and non-executive directors operating on one board may jeopardise the board’s ability to monitor executive directors and provide independent advice to management*. On the other hand, according to the shareholder, *members of the supervisory board in Poland may also experience difficulties in supervising directors due to the fact that they do not work at the company on a day to day basis and only have periodic involvements with the management of the company* (see also section ‘Other Board Issues’ in chapter V ‘Corporate Governance in Poland’). Individual members may be delegated to perform supervisory tasks on a permanent basis (members so delegated have the right to attend meetings of the management board and provide advice thereat).<sup>813</sup>

One problem of a two tier-board system might be the absence of trust in the working relationships between the supervisory board and the management board. However, this issue may also occur in the one-tier board model, where executive directors might be reluctant to co-operate with all or some non-executive directors.

All participants who answered my question (and justified their answer) agreed that *a two tier-board system might produce certain advantages for companies with a dispersed share structure (outside system). This concerns entities where ‘shareholders may be unable to express their expected goals of the company as their interests differ, though they all expect a yield in the forms of dividends and growth in the company’s share price’<sup>814</sup>. ‘This can be sorted out by the separation of the supervision and management functions as characterised by the two-tier system. The supervisory board will be responsible for supervising and ensuring the management board to establish the company’s goals on behalf of the shareholders and to identify the common interest of*

---

<sup>809</sup> *ibid.*

<sup>810</sup> One management board member – text to n 791.

<sup>811</sup> Text to n 806.

<sup>812</sup> A minority shareholder of a JSC, interviewed in April 2014.

<sup>813</sup> Art. 390§2CCC.

<sup>814</sup> According to one management board member – text to n 791.

shareholders' – one of shareholders<sup>815</sup> said.

Significantly, a company lawyer<sup>816</sup> raised the point that, *in British unitary board structures, all directors (executive or non-executive directors) have equal legal status and equal responsibility in law. 'By holding all directors equally accountable, board accountability is enhanced'* – the participant concluded<sup>817</sup>.

This point of view was challenged by another participant. A president of a management board<sup>818</sup> declared that *the two-tier model has a system of safeguards that protect against directors' malpractice. This includes, among other things, individual control of LLCs, or the so-called derivation action, which shields shareholders against dishonest directors.*

The derivation action gives every single shareholder irrespective of share ownership the possibility to bring a suit on behalf of a company, where the company fails to bring an action for redressing damage within one year from the disclosure of the injurious act<sup>819</sup>. It should however be noted that the significance of derivative action in Polish corporate practice is rather minimal<sup>820</sup>. The payoff for a suing shareholder is likely to be negative in the majority of cases, not mention the fact that information asymmetry makes it difficult for the shareholder to effectively bear the burden of proof. There is no favourable cost regime in place to facilitate the use of derivative action nor is there a system of presumptions to mitigate the aforementioned information asymmetry.<sup>821</sup>

There are two other reasons for which a one-tier board model might turn out to be a failure in Poland. One shareholder<sup>822</sup> suggested that the legislative project might not be easy to implement, which is typical for provisions in the area of corporate governance in Poland:

*'This is not fully adequate legislation. It is, at the same time, overregulated, underregulated and misregulated. Some provisions of the law have political character and are intended to gain support of various actors. Sometimes, provisions of law are too general and are not instructive enough.'*

Almost all participants pointed out *the cost of implementation of a new project and bureaucracy, which might make registration of a new governance system very complicated. Ultimately, entrepreneurs might decide to go for the well-known and verified model of corporate*

---

<sup>815</sup> Text to n 770.

<sup>816</sup> An employee of a legal firm, interviewed in November 2014.

<sup>817</sup> *ibid.*

<sup>818</sup> Text to n 796.

<sup>819</sup> Art. 295CCC (for an LLC) and Art. 486CCC (for a JSC).

<sup>820</sup> Oplustil & Radwan (n 7) 486.

<sup>821</sup> *ibid.*

<sup>822</sup> A minority shareholder of a LLC, interviewed in December 2013.

*governance.*

Finally, one participant<sup>823</sup> was surprised with my idea of implementing a one-tier board model in Poland, which, I believe, was as a consequence of the prevailing cultural preference for the two-tier board system in Poland. ‘*Would it be possible to transplant the British model to Poland?*’ – the shareholder<sup>824</sup> asked me. I based my next question on this participant’s answer. It was addressed to board members and shareholders only.

## **E. LEGAL TRANSPLANT IN POLISH CORPORATE GOVERNANCE**

Legal transplant in Polish corporate law is not a new occurrence. As a matter of fact, Polish corporate law has been almost entirely borrowed from foreign legal systems over the last century.

The primary source of inspiration was German corporate law<sup>825</sup>. However, it would be too simplistic to claim that Polish corporate law resulted from a slavish imitation of German laws. The legislative inspirations also include the Netherlands, Belgium, France, Hungary and Slovenia<sup>826</sup>.

The statutory laws have been to some extent overlapped by legal practice (including forms and covenants) applied by large law companies, the majority of whom are either part of a multinational chain or have borrowed Anglo-Saxon *modus operandi* and know-how<sup>827</sup>.

Finally, the WSE fleshed out the statutory (not particularly instructive) laws by borrowing from various codes of best practices, mainly British corporate governance codes, in particular Cadbury and Hampel<sup>828</sup>.

Literature<sup>829</sup> on the subject provides the following information:

‘Given limited resources, such as human capital and efficient institutions (courts and academia) on the one hand, and growing demand from the business environment for an adequate legal framework – on the other, the import of legal concepts and institutions proved to be the most cost-effective and sometimes the only affordable way of reducing existing discrepancies in legal sophistication in order to address the needs of the transforming economy.’

---

<sup>823</sup> A minority shareholder of a JSC, interviewed in November 2014.

<sup>824</sup> *ibid.*

<sup>825</sup> Oplustil & Radwan (n 7) 467.

<sup>826</sup> *ibid.*

<sup>827</sup> *ibid* 469.

<sup>828</sup> Dzierżanowski & Tamowicz (n 8).

<sup>829</sup> Arkadiusz Radwan, ‘Non ex regula ius sumatur or about a few endangered truths’ (2007) 3 Quarterly for the Entire Commercial, Insolvency and Capital Market Law 6.

In addition, the overwhelming majority of the EC company law directives have been implemented in Polish corporate law<sup>830, 831</sup>. It must, however, be stressed that the implementation did not require fundamental changes to Polish law. This is explained by the fact that early directives bore a strong German influence, which in turn was, to a significant extent, 'directly' (without European intermediation) reflected in the Polish pre-war legislation (the Commercial Code of 1934, which was a prototype for the Company Code of 2000; see chapter I)<sup>832</sup>. Thus, pieces of European legislation had been transplanted into a legal system characterised by cultural affinity to the 'donor'. Oplustil and Radwan<sup>833</sup> call the transplanted rules 'new rules in a pre-digested form'.

This occurrence throws a different light onto the dispute about the possibility of transplanting without taking into account social and economic changes in the recipient legal culture (see section 'Legal Transplant' in chapter III – 'Literature Review'). It actually proves that 'rules of private law can survive without any close connection to any particular people, any particular period of time or any particular place'<sup>834</sup>. It should be added, at this point, that four distinct systems of commercial law were applied in Poland prior to 1934: the German Commercial Code of 1861 (Southern Poland), the revised German Commercial Code of 1897 (Western Poland), the Russian Commercial Code (the North-Eastern territory) and the French Code de Commerce (central Poland)<sup>835</sup>.

Having reached such a conclusion, I decided to ask participants what they think of 'direct' transplant from Anglo-Saxon law. I asked the following question:

**Do you think that it is possible to transplant any of the Anglo-Saxon models of corporate governance to Poland directly – without any structural adjustments, eg employing a larger number of independent directors or increasing the amount of time they have to be present at the company? Please justify your answer.**

---

<sup>830</sup> Oplustil & Radwan (n 7) 463.

<sup>831</sup> The influence of the primary EU legislation on Polish corporate law has been a lot weaker. In other EU Member States, the ECJ case-law based on the freedom of establishment and capital movement contributed to a dramatic change in the corporate landscape in Europe, giving rise to the phenomenon of companies' mobility and dismantling protectionist measures against foreign investors (golden shares). In consequence, a number of 'pseudo-foreign companies' appeared rapidly in member states adhering to strict capital regimes, such as Germany, the Netherlands or Denmark. Taking into account the relative cost of incorporating a company in Poland (among the highest in Europe) one could reasonably have expected a similar explosion of imported "ltds" in this part of Europe – but, this did not happen. Oplustil & Radwan (n 7) 465-466.

<sup>832</sup> For more information on legal transplant in Polish commercial law see, for example, Oplustil & Radwan (n 7) 448-452 and 463-469.

<sup>833</sup> *ibid* 464.

<sup>834</sup> Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review* 79.

<sup>835</sup> For further explanation see, for example, Norman Davies, *Heart of Europe. The Past in Poland's Present* (Oxford University Press 2001); HC Gutteridge, 'Review: Polish Commercial Law: Polish Science and Learning' (1942) 24 (2) *Journal of Comparative Legislation and International Law* <[www.jstor.org/stable/754988](http://www.jstor.org/stable/754988)> accessed 7 July 2011.



Out of the 25 participants (14 corporate officers and 11 shareholders) who were asked this question, nine responded to it. One board member had no opinion about the issue. Seven participants, who participated in structured interviews (all shareholders), left this question blank. I contacted the remaining board members (nine participants; all interviewed by e-mail) in order to put this question to them again, but they have not responded yet (see chapter II – ‘Research Methodology’ – ‘Data Collection’, where I elaborate on the process of interviewing business people in Poland).

For two board members<sup>836</sup> *Polish companies practically operate the same way as the Anglo-Saxon companies, and only the board structure differentiates them.* For two other corporate directors, *direct transplant is currently possible, as Poland has a prosperous free-market economy*<sup>837</sup>. One management board president<sup>838</sup> declared:

*‘20 years ago the influence of external control (in the form of commodity, financial, take-over and other markets) did not exist or was not sufficiently effective. In such conditions, the efficient functioning of internal supervision was of fundamental importance. The investment potential of the Polish population was weak, therefore the main sources of capital had to be looked for elsewhere. The traditional model assumed the significant role of a strategic investor, in Polish circumstances – most likely foreign. Both the managerial skills and technical assets of Polish enterprises were archaic and not adapted to the new challenges of the emerging market environment. Strategic investors, especially foreign ones, were able to bring to a company not only capital, but also a new culture of management, of company behaviour towards its environment, new technology etc.’*

He went on to add that: *‘There has been a considerable change in economic and legislative terms*<sup>839</sup>. According to this participant, *various sources of information, eg the Polish Agency for Enterprise Development*<sup>840</sup>, *declare that the potential of Polish market has improved immensely.* With respect to the legislative terms, the president of a management board<sup>841</sup> drew attention to the fact that the Cadbury Code was the main inspiration for the Warsaw Stock Exchange’s creation of the Code of Best Practices of 2002. *‘The Cadbury Code provisions, alongside other Anglo-Saxon solutions*

---

<sup>836</sup> One management board member – text to n 772; one supervisory board president of an LLC, interviewed in January 2014.

<sup>837</sup> One management board president – text to n 763; text to n 211.

<sup>838</sup> One management board president, *ibid.*

<sup>839</sup> *ibid.*

<sup>840</sup> Its reports on the condition of small and medium-sized enterprise sector in Poland are available on <[www.en.parp.gov.pl/index/more/10843](http://www.en.parp.gov.pl/index/more/10843)> accessed 23 March 2015

<sup>841</sup> Text to n 763.

*encompassed by Best Practices and corporate practice brought to Poland by foreign investors, has become an integral part of our corporate governance system, and has been working in favour of business in Poland’* – the participant<sup>842</sup> declared.

Four interviewees disagreed with these opinions. For one shareholder<sup>843</sup> *‘any further move towards the Anglo-Saxon system of corporate governance is only likely to happen at the margins of the Polish system, as domestic elites will not allow for the reduction of their power by such changes.’* Another shareholder<sup>844</sup> said that *some adjustment to the Polish legal system would have to be made*. He did not, however, specify what sort of adjustment would have to be made to Polish corporate governance. Two other shareholders did not justify their opinion.

In general, my interviewees expressed minimal interest in this particular question, despite the fact that I selected respondents who have extensive knowledge of corporate governance in Poland. In this respect, one president of a supervisory board<sup>845</sup> said: *‘This question should rather be addressed to members of the legislative committee. Some legal theorists might also be able to discuss this issue. This is probably an issue that needs to be researched further.’*

The following subsection concerns the issue of board committees. I found it necessary to ask all participants about board committees, as the Polish legislator has not drawn much attention to them (see section ‘Other Board Issues’ in chapter V ‘Corporate Governance in Poland’). Moreover, one participant<sup>846</sup> said that an adoption of a one-tier board model would require a different approach to board committees, which business practitioners in Poland are reluctant to consider.

## **F. OTHER BOARD ISSUES**

### **1. Board committees on the supervisory board**

Board committees are an essential component of the one-tier board system. They are expected to perform various functions, of which, according to Charkham<sup>847</sup>:

*‘the main one (...) [is] to assist the dispatch of business by considering it in more detail than would be convenient for the whole board... the second purpose is to increase objectivity*

---

<sup>842</sup> *ibid.*

<sup>843</sup> Text to n 823.

<sup>844</sup> Text to n 770.

<sup>845</sup> Text to n 836.

<sup>846</sup> One minority shareholder – text to n 823.

<sup>847</sup> Jonathan Charkham, *Keeping Better Company: Corporate Governance Ten Years On* (Oxford University Press 2005).

either because of inherent conflicts of interest such as executive remuneration, or else to discipline personal preferences as in the exercise of patronage.’

They, thus, perform a critical function in corporate governance.

Committees are common in the Anglo-Saxon model of corporate governance. They are established within the board of directors, and mainly composed of non-executive directors.<sup>848</sup>

In Poland, committees may be appointed to the supervisory board, which should regularly report about their work. According to my doctrinal research findings, they are not, however, in general use in Polish companies. According to PricewaterhouseCoopers<sup>849</sup>, the majority (59%) of examined supervisory boards are not composed of any committee, and an audit committee exists only in one-third of the examined boards. Risk committees are rarely created in listed companies, mainly in financial institutions. Risk monitoring is, thus, vested mainly into audit committees<sup>850</sup> (see also Appendix 7).

Under the Act of 29 May 2009 on Statutory Auditors, Their Self-Governing Organisation, Entities Authorised to Audit Financial Statements and on Public Oversight, an audit committee is obligatory in companies where the supervisory board is composed of more than five members<sup>851</sup>. If such a committee has not been established in companies that have a smaller board, statutory duties are performed by all supervisors collectively. However, PwC<sup>852</sup> reports that their performance deviates from the practice applied by the best audit committees. It becomes evident while comparing the time dedicated to performing committee duties by supervisors and members of audit committees, as well as the number of meetings with expert auditors and heads of the internal audit.

The Code of Best Practices of 2010 provides for no regulation of board committees and, for the tasks and operations of the board committees, only refers generally to Annex I of the Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors (...). A regulation requiring the establishment of at least an audit committee within the supervisory board was abolished, which was criticised by the legal doctrine<sup>853</sup>.

Taking this critique into consideration, as well as the growing use of board committees in other countries, eg Japan (see section ‘Hybrid Corporate Governance in Japan’ in chapter III), I

---

<sup>848</sup> See, for example, Mallin (n 27) 173-179; see also chapter III, for example, section ‘Hybrid Corporate Governance in Japan’.

<sup>849</sup> PricewaterhouseCoopers Poland, ‘Zmiany w Funkcjonowaniu Rad Nadzorczych Zmierzają w Dobrym Kierunku Lecz Wymagają Przyspieszenia’ <[www.pwc.pl/pl/biuro-prasowe/2014/2014-03-20-zmiany-w-funkcjonowaniu-rad-nadzorczych-zmierzaja-w-dobrym-kierunku-lecz-wymagaja-przyspieszenia.jhtml](http://www.pwc.pl/pl/biuro-prasowe/2014/2014-03-20-zmiany-w-funkcjonowaniu-rad-nadzorczych-zmierzaja-w-dobrym-kierunku-lecz-wymagaja-przyspieszenia.jhtml)> accessed 16 May 2014.

<sup>850</sup> *ibid.*

<sup>851</sup> Art. 86, point 1 of the Act, implementing Art. 41 of the 2006/43/EC Directive.

<sup>852</sup> PricewaterhouseCoopers Poland, ‘Komitety Audytu w Polsce w Roku 2011. Badanie Spółek Publicznych Notowanych na GPW’ <[www.forumradnadzorczych.pl/en/czytaj/155/raport](http://www.forumradnadzorczych.pl/en/czytaj/155/raport)> accessed 15 May 2014.

<sup>853</sup> For example Oplustil & Radwan (n 7) 491.

decided that this was an issue that should be raised during my interviews. I asked participants the following questions:

- **What do you think of having committees on supervisory boards in Poland?** They are currently obligatory in companies where the supervisory board is composed of more than five members.
- **Do you think that they should be used in Poland on a wider scale?**
- **Should they operate on a statutory basis?**

**Please justify your answers.**

I interviewed 37 participants, but only 11 responded. Three board members, who were interviewed by e-mail, left them blank, as did the other participants who took part in structured interviews (for further explanation concerning data collection during the interviews, see chapter II – ‘Research Methodology’). I contacted these board members in order to repeat the questions, but they have as yet, not replied to my e-mail.

Out of the 11 participants who answered my questions, three (two members of the management board and one president of a supervisory board) declared that *committees should be present in all listed companies, and should be regulated statutorily*. The remaining eight participants (five board members, two employees and one shareholder) *found the current regulation sufficient*. Importantly, all the participants who answered my question said that *the presence of committees on a supervisory board is beneficial for the interests of a company*.

A head of the audit committee of a JSC<sup>854</sup> said as follows:

*‘Committees are crucial for corporate governance. Despite the fact that they have only recently been introduced in Poland, corporate practice has proved their usefulness. They enable supervisors to discuss some important issues more thoroughly in a smaller team of professionals. This is not always possible during meetings involving all the supervisors, eg due to time limitations. Committees provide supervisory boards with greater control and knowledge of the most crucial areas of the company’s operation. Supervisors also have the chance to express their opinions on particular issues and propose recommendations. Committee statements keep the entire board’s work in order.’*

One supervisory board president<sup>855</sup> expressed the following opinion about a strategy committee:

---

<sup>854</sup> A member of the supervisory board of a JSC, interviewed in December 2014.

<sup>855</sup> Employed by a JSC, and interviewed in December 2012.

*'I came across strategy committees – I find them very significant, although I think it is important not to do the entire job for the management board, but rather insist that directors prepare a strategy, which can subsequently be discussed by the supervisory board. Meanwhile, some supervisory boards or some of their members have an inclination to create a strategy for the management board.'*

Another supervisory board president<sup>856</sup> suggested that *supervisory boards should consider the needs of a company while creating committees*. In this president's opinion, *the existence of an audit committee on every board is justified, while the establishment of other committees might only be a waste of a company's funds. One example of an untypical temporary solution is a restructuring committee created for the period of a company's restructuring in order to monitor its progress and decide on its priorities*<sup>857</sup>. This respondent also suggested *not getting used to designated teams, and verifying whether their presence is still necessary in the supervisory board*<sup>858</sup>.

Only one participant<sup>859</sup> was concerned about the effectiveness of committee boards in Poland. From this person's point of view, *including committees on supervisory boards has an impact on their dimension; boards without committees might be smaller. Meanwhile, 'larger boards can be less effective than smaller boards because of coordination problems'*<sup>860</sup> (see Appendix 8). In this respect, Yermack, Eisenberg, Sundgren and Wells<sup>861</sup> provide evidence that smaller boards are associated with higher company value. It should, however, be taken into consideration that a bigger company might require a bigger board. Otherwise, its efficiency might be questioned, as a smaller number of supervisors might have difficulties carrying out all their duties.

Finally, there were also some controversies amongst the participants in relation to the composition of boards. This concerned the participation of employees, banks and women on the supervisory board. All these issues are presented below in separate subsections.

---

<sup>856</sup> Text to n 800.

<sup>857</sup> *ibid.*

<sup>858</sup> *ibid.*

<sup>859</sup> A minority shareholder of a JSC, interviewed in May 2013.

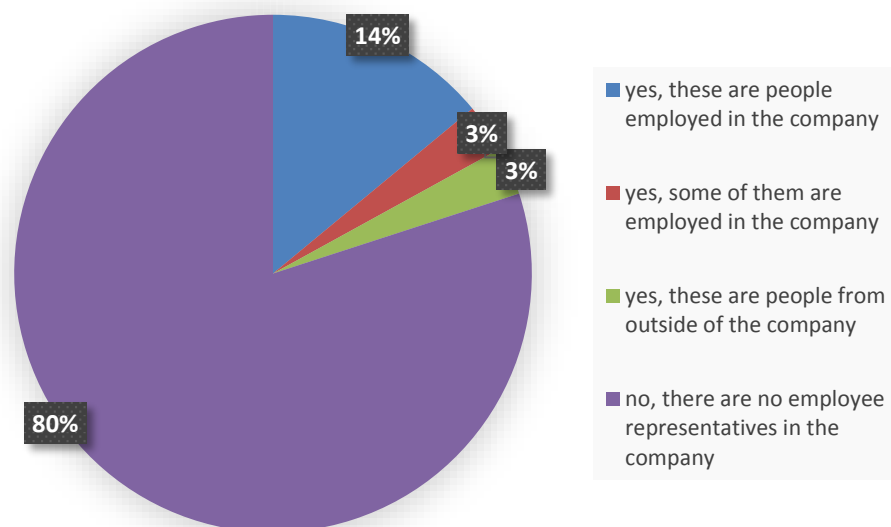
<sup>860</sup> *ibid.* cf Jay W. Lorsch in Martin Lipton and Jay W. Lorsch, 'A Modest Proposal for Improved Corporate Governance' (1992) 1 Business Lawyer 59; and Michael C. Jensen, 'The Modern Industrial Revolution, Exit and the Failure of Internal Control Systems' (1993) 48 Journal of Finance 831.

<sup>861</sup> David Larry Yermack, 'Higher Market Valuation of Companies with a Small Board of Directors' (1996) 40 Journal of Financial Economics 185; Theodore Eisenberg, Stefan Sundgren and Martin T. Wells, 'Larger Board Size and Decreasing Firm Value in Small Firms' (1998) 48 Journal of Financial Economics 35.

## 2. Employees and bank representatives on supervisory boards in Poland

In general, there is no legal requirement to include employees on supervisory boards in Poland. Companies that have been put through indirect privatisation may only be obliged to appoint an employee (and a supplier) representative to the supervisory board<sup>862</sup>. Thus, they (employees) are mainly present in companies in which one of shareholders is the State Treasury. According to Deloitte<sup>863</sup>, the number of employees on boards in Poland is relatively low, and there is no employee representative in 80% of all companies listed on the Warsaw Stock Exchange.

**Chart 4.** Employees on supervisory boards\* in Poland<sup>864</sup>



\*Research were conducted between March and April 2012.

I asked participants what they think of including employees on the supervisory board. In particular, I wanted to learn whether, according to my participants, the presence of employees on the supervisory board may contribute to the more efficient functioning of corporate governance in Poland.

I asked the following question:

**Do you think that employees and representatives of banks (in companies where they are**

<sup>862</sup> See Art. 12–16 of the Act of 30 August 1996 on the Privatisation Act. See also section ‘The Supervisory Board’ in chapter V.

<sup>863</sup> Deloitte Poland, ‘Raport „Współczesna Rada Nadzorcza 2012” (...)’ (n 722).

<sup>864</sup> *ibid.*

**shareholders) should be appointed to supervisory boards? Please justify your answer.**

I also included banks in my question, as German corporate law provides for banks' representation on boards (see below). As I mentioned in Chapter I 'Introductory Remarks' and in section E of this chapter, the Polish mechanism of corporate governance was mainly based on German law in this area.

Only one participant<sup>865</sup> declared that *at least one employee should be appointed to the supervisory board*. In this participant's opinion, *this could bring some broader perspectives to and a fresher insight into the company's activity*. The remaining 16 participants (out of 37) *opposed the concept of employees' presence on supervisory boards*. This included all board members, one shareholder and one employee of a JSC<sup>866</sup>, who was unsure about this idea.

My questionnaire was given to 23 participants (see chapter II – 'Research Methodology' – 'Data Collection', where I explain the process of conducting interviews in Poland), out of whom 20 left this question blank (three persons answered the question, but only two employees justified their opinion). The other 14 respondents who took part in unstructured interviews (responding by e-mail, Skype or face to face; for further explanation, see chapter II – 'Research Methodology' – 'Data Collection') gave one of the following answers: 'I am not sure', 'I do not think this is a good idea', 'I do not think so', or 'I doubt it would improve the functioning of corporate governance'. Only two of the 14 participants justified their answers.

One president of the supervisory board in a large JSC<sup>867</sup> expressed the following opinion:

*'Employees are usually a very poor representation. They are open to all kinds of pressure coming from various sides, including these with limited understanding of corporate governance and those who tend to go along with the view of the majority. They should be prevented from becoming board members whenever it is possible. Employee representatives on supervisory boards may hinder the process of making decisions. I mean decisions that are in the best interests of the company as a whole, but not necessarily in the best interests of employees as a group.'*

Another supervisory board president<sup>868</sup> pointed out that *'[w]hen we discuss technical issues during our meetings, the technical knowledge of some employees turns out to be vast, especially in the area of mining and metallurgy.'*

---

<sup>865</sup> A minority shareholder of an LLC, interviewed in January 2014.

<sup>866</sup> One minority shareholder – text to n 823; this employee was interviewed in July 2013.

<sup>867</sup> Text to n 800.

<sup>868</sup> Text to n 836.

Indeed, employee representatives defend the interests of employees that do not always comply with the long-term plans of companies. On the other hand, one president of a management board<sup>869</sup> noticed that *employees on supervisory boards 'identify themselves more closely with the company'*. According to one employee<sup>870</sup>, *employees on boards may also facilitate communication and mutual understanding between corporate authorities and the workforce*.

Simultaneously, the presence of employees on boards may also cause conflicts within management. One employee<sup>871</sup> declared that employees often raise some problematic issues: *'We want to talk about pay rise, the excessive remunerations that directors receive, some investments that are necessary in our opinion, better work conditions for us, etc.'*

In Germany, the Cromme Code 2002<sup>872</sup> includes the possibility for bank representatives to sit on the supervisory board of German corporations. Banks in Germany are able to cast proxy votes on behalf of the many small investors they represent<sup>873</sup>. As a consequence, they assume an important role in controlling corporate management and protecting minority shareholders<sup>874</sup>. It is, however, assumed that the direct influence of banks in a company will decline over time and it will be more the distinction between ownership and control that encourages corporate governance reform<sup>875</sup>.

Out of 37 participants, 15 answered my question concerning banks and their participation on supervisory boards (the same 15 who answered my question about employees).

14 board members, who took part in unstructured interviews (see chapter II – 'Research Methodology' – 'Data Collection'), answered that *only the shareholders should decide about the composition of the supervisory board*. The other 22 participants who received my questionnaire left the question blank (for further information concerning data collection during my interviews see chapter II – 'Research Methodology'). Only one of them – a shareholder of a JSC<sup>876</sup> – answered and took the stance that *bank representatives should be appointed to supervisory boards in Poland. It is, however, in the opinion of this person, superfluous for the government to regulate this by the Company Code, as companies have already been given the possibility of appointing bank*

---

<sup>869</sup> Text to n 763.

<sup>870</sup> Text to n 866.

<sup>871</sup> *ibid.*

<sup>872</sup> The German voluntary code of corporate governance, based on the 'comply or explain' principle.

<sup>873</sup> Andreas Hackethal, Reinhard H. Schmidt and Marcel Tyrell, 'Banks and German Corporate Governance: On the Way to a Capital Market-Based System?' (2005) 13 (3) *Corporate Governance: An International Review* 397.

<sup>874</sup> Christel Lane, 'Changes in Corporate Governance of German Corporations: Convergence to the Anglo-American Model?' (2003) 7 (2/3) *Competition & Change* 79.

<sup>875</sup> Marco Becht and Colin Mayer, 'Introduction' in Fabrizio Barca and Marco Becht (eds), *The Control of Corporate Europe* (Oxford University Press 2001). See also Gerhard Cromme, 'Corporate Governance in Germany and the German Corporate Governance Code' (2005) 13 (3) *Corporate Governance: An International Review* 362. The same argumentation applies for Japan; see for example Y. Yafe, 'Corporate Governance in Japan: Past Performance and Future Prospects' (2000) 16 (2) *Oxford Review of Economic Policy* 74.

<sup>876</sup> This shareholder was interviewed in October 2014.



*representatives by not prohibiting shareholders to sit on supervisory boards (the same answer was given by those participants who were against banks' participation in boards).* This participant did not explain why – in his opinion – banks should have their representatives on boards.

Słomka-Gołębiowska's<sup>877</sup> empirical research on the impact of banks on companies' dealings and decision-making reveals a weak influence of banks on corporate governance of public companies in the years 1999-2002. According to her research<sup>878</sup>, supervisory boards of almost half of surveyed companies have at least one bank representative – usually the major creditor of a given company. However, banks are rather reluctant to engage themselves in the decision making process in companies to whom they extend credit<sup>879</sup>. In Słomka-Gołębiowska's<sup>880</sup> opinion, this may be explained by the rational aversion to legal risk associated with a conflict of interests and the risk of a violation of the rules prohibiting insider dealing.

My research participants were also unenthusiastic about the idea of mandatory participation of women in corporate governance.

### **3. Gender diversity within corporate governance in Poland**

As I have mentioned in chapter IV, the issue of gender diversity on corporate boards was debated in the US and the UK. The opinions expressed, in this chapter, indicates that the presence of women on boards may lead to better company performance (see section 'Board Diversity' in chapter V). Meanwhile, according to PricewaterhouseCoopers<sup>881</sup>, the participation of women on supervisory boards of listed companies in Poland is not high (for details see section 'Other Board Issues' in chapter V). These two facts encouraged me to ask the following question during the interviews:

**Do you think that laws should oblige companies to appoint women to corporate governance positions? Please justify your answer.**

Participants who answered my question (38 in total, as one person who withdrew from participating in this project also answered this question<sup>882</sup>) were positive about the suggestion that

---

<sup>877</sup> Agnieszka Słomka-Gołębiowska, 'Czy banki wypełniają lukę w ładzie korporacyjnym w Polsce' (2007) 1 Quarterly for the Entire Commercial, Insolvency and Capital Market Law.

<sup>878</sup> *ibid.*

<sup>879</sup> *ibid.*

<sup>880</sup> *ibid.*

<sup>881</sup> PwC, 'Rady Nadzorcze 2013. Skuteczność (...)' (n 539).

<sup>882</sup> This person withdrew from the participation in this research, but returned a partially completed form. This was a partner of a general partnership, who had been going to take part in structured interviews.

*a larger number of women could sit on boards in Poland. However, none of my interviewees found it reasonable to create laws that would impose on companies the obligation to appoint a prescribed number of women to boards. The following quote from one supervisory board president<sup>883</sup> summarises the survey best:*

*‘In our case the presence of women works in our favour, but I would not go as far as to state that 40%<sup>[884]</sup> of board members should be women. I think this is a path that leads to nowhere, because we would also have to say that 10% of board members should be Muslims and 15% – engineers. Board diversity is composed of many various features.’*

While conducting unstructured interviews, I referred to Rodrigues’s<sup>885</sup> opinion, according which diversity is an important precursor to independence of thought, and therefore an increased degree of heterogeneity among board members would improve the quality of board oversight (for details see chapter IV). Nevertheless, *none of my participants were able to state that more women on supervisory boards in Poland would have a positive influence on independence in the decision making process in Poland, in particular in companies with highly consolidated ownership and control.*

#### **4. Obligatory training for board members in Poland**

Another issue that has to be raised in this chapter is training for board members in Poland. I have omitted this issue in chapter V, as Polish business literature does not deal with it practically. The American and British legal doctrines also do not consider training for corporate officials a problematic aspect within their corporate governance system. On the other hand, I dedicated considerable attention to this aspect of corporate governance while reviewing literature concerning the hybridisation of corporate governance.

Keeping this in mind, in particular the case of Malaysia, where an obligatory training programme was imposed on listed companies, I asked the following questions:

- **Do you think that training for board members should be obligatory?**
- **Is training for board members essential for running a business?**

---

<sup>883</sup> Text to n 855.

<sup>884</sup> This refers to some countries that decided that 40% of board members should be women, eg Norway; see also section ‘Board Diversity’ in chapter IV and Appendix 9.

<sup>885</sup> Rodrigues (n 531).

**Please justify your answer.**

34 participants responded. The remaining three people, who responded via a questionnaire, left the question blank. Out of the 34 participants, 17 (all board members and three shareholders) who were interviewed either via e-mail or Skype, face to face (board members), or via a questionnaire (three shareholders) provided their answers with an explanation (see chapter – II ‘Research Methodology’, where I explain the data collection process during my interviews).

All 34 participants declared that *a decision about training for board members should be left to the discretion of the company*. 17 participants (out of 34) explained that *obligatory training might either be too costly for companies or superfluous*. One board member<sup>886</sup> added that *mandatory training is actually against business freedom: ‘This is almost like choosing business partners for companies.’* All 17 participants emphasised that *there must be some effort made to ensure that companies execute effective training for their officials*. They did not explain what exactly could be done in this respect.

Finally, one shareholder<sup>887</sup> said that *the WSE could impose on listed companies an obligation to organise mandatory training for directors only and in some areas only (the most crucial for a company’s life). Training for supervisors, in areas other than the most crucial ones, could be organised by companies optionally. This, however, still might expose companies to loss*. Moreover, *since supervisors have a great influence on the management of a company, they should also take part in obligatory training*.<sup>888</sup>

With respect to my second question – ‘Is training for board members essential for running a business?’, 17 respondents out of 34 (the same who responded my first question) were of the opinion that *such training has a significant meaning for companies because it enables board members to discharge their duties more efficiently, which – in consequence – may improve the overall company performance*. All the interviewees agreed with me that *continuous training and skill enhancement for directors may improve the flow of information between management and supervisory boards in Poland, as directors are not currently obliged to provide supervisors with information regarding the company’s operation* (see section ‘Other Board Issues’ in chapter V).

---

<sup>886</sup> A member of the supervisory board of a JSC, interviewed in December 2012.

<sup>887</sup> A minority shareholder of an LLC, interviewed in July 2012.

<sup>888</sup> *ibid.*

## G. ENLIGHTENED SHAREHOLDER VALUE IN POLAND

The matter of the ‘company’s interest’ is perceived as a fundamental determinant of the operation of the company’s authorities and is frequently applied in Poland as a benchmark in assessing the legality of a given corporate action<sup>889</sup>. Prevailing legal doctrine in Poland tends to interpret the notion of company’s interest as a ‘result’ or outcome of balancing the interests of persons involved in the company, including shareholders as well as stakeholders, eg creditors, employers, suppliers<sup>890</sup>. This is enlightened shareholder value, which has already been explained in chapter III (with respect to South Africa and Poland) and in chapter IV (in relation to the US and the UK).

As I explained in chapter III, in Poland, enlightened shareholder value was reflected by the Code of Best Practices of 2005<sup>891</sup> and repealed by the Code of Best Practices of 2007, leaving the determination of company interest up to the managers, commentators and ultimately to the courts. During my pilot interviews<sup>892</sup>, I heard negative opinions about the repeal, and therefore I decided to ask the other participants whether they would like enlightened shareholder value to be included with the newest version of the Code, and what they thought of South African stakeholder inclusivity in the context of Polish corporate governance. I formulated my questions as follows:

- **Do you think that the application of enlightened shareholder value in Polish corporate practice should be encompassed by the Code of Best Practices?**

The King Code Committee in South Africa has recently included into its code of best practices the so-called stakeholder inclusivity, which means that stakeholders’ interests and expectations are considered on the basis that this is in the best interests of the company. Thus, they are not perceived as a mere tool to serve the interests of the shareholder.

- **What do you think of Polish companies taking the same approach?**

**Please justify your answer.**

Out of 37 participants, 24 answered my question concerning enlightened shareholder value. The remaining 13 participants were given a questionnaire and left this question blank (see subsection ‘Data Collection’ in chapter II – ‘Research Methodology’). The majority of the participants who answered my question were board members. They all took part in unstructured

---

<sup>889</sup> Adam Opalski, ‘O pojęciu interesu spółki kapitałowej’ (2008) 11 Przegląd Prawa Handlowego 16.

<sup>890</sup> Oplustil & Radwan (n 7) 461.

<sup>891</sup> General Rules, rule no. 1.

<sup>892</sup> Text to n 529.

interviews (for further explanation concerning unstructured interviews conducted during my research, see chapter II – ‘Research Methodology’ – ‘Data Collection’) There were also six shareholders and four employees in this group of people, who responded via a questionnaire.

Only ten out of 24 participants expressed their opinion about the South African model of corporate governance (the others either left the question blank or did not respond via e-mail). This can be explained by the fact that this is a fairly new issue in corporate governance across the world. Thus, it might not be entirely understandable for business participants from outside of South Africa.

The majority of participants (17 out of 24) declared that *the enlightened shareholder model should be included and explicitly defined in the Code of Best Practices, since it is covered by protective legal provisions, for example labour law, insolvency law, consumer law, banking law*. Out of the remaining participants, for two board members<sup>893</sup> and one shareholder<sup>894</sup>, *it is pointless to include this model with this Code, as it has been employed by management boards anyway*. ‘*The members of the management board and supervisory board cannot give priority to the economic interests of stakeholders before the interests of shareholders as a group*’ – one of them<sup>895</sup> declared. In contrast, two sole entrepreneurs<sup>896</sup> and two shareholders<sup>897</sup> think that *the current regulation is sufficient, and that South African stakeholder inclusivity should not be adapted in Poland*. As one of shareholders<sup>898</sup> explained, ‘*the notion of a stakeholder is simply too broad, and therefore impossible to execute*.’ The other participants were against implementing stakeholder inclusivity in Poland, but did not justify their answer.

## H. REMUNERATION POLICY IN POLAND

The debate over the issue of remuneration for corporate officials is summarised in chapter IV (mainly with respect to the US and the UK, see also chapter V ‘Corporate Governance in Poland’ – ‘Remuneration Policy’). In particular, considerable attention has been drawn to the so-called advisory vote of shareholders on the remuneration statement, required in the US and the UK.

In Poland, the Code of Best Practices refers only to the Commission Recommendation of 30 April 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies, which raises the issue of advisory

---

<sup>893</sup> One management board vice-president – text to n 801; one management board member – text to n 791.

<sup>894</sup> A minority shareholder of a JSC, interviewed in June 2013.

<sup>895</sup> One management board member – text to n 791.

<sup>896</sup> Two suppliers of limited companies, interviewed in November 2013.

<sup>897</sup> One minority shareholder – text to n 782; and one minority shareholder of an LLC, interviewed in May 2013.

<sup>898</sup> One minority shareholder of an LLC, *ibid*.

vote. This means that companies, which are established in Poland, may (but are not obliged to) implement this solution into their statutes/articles of association. Taking this into consideration, I asked participants the following question:

**Do you think that shareholders should be given the right to approve remuneration for directors? Please justify your opinion.**

Moreover, I asked participants what they would like to change in the remuneration policy for corporate officials in Poland. There are several legislative lacunas in this area (see section 'Remuneration Policy' in chapter V), so I decided to formulate a general question not to impose certain answers on my interviewees. I formulated my question in the following way:

**Is there any issue in the remuneration policy for corporate officials that – in your opinion – requires amendments? Please justify your answer.**

Out of 37 participants, 29 answered my first question. The remaining eight participants who took part in structured interviews left the question blank (see chapter II – 'Research Methodology', in which I explain the process of collecting data, including the process of conducting interviews, during my research).

For 16 participants (mainly board members, who attended unstructured interviews, but also shareholders and sole entrepreneurs, who responded via a questionnaire; see chapter II – 'Research Methodology' – 'Data Collection'), *shareholders should only have an advisory vote with respect to the remuneration scheme of the company*. One of them<sup>899</sup> noted that *supervisory boards, which are elected by shareholders' meetings, decide about directors' remuneration* (Art. 347§1CCC; see also section 'Remuneration Policy' in chapter V). Thus, *supervisors express the opinion of shareholders while deciding about remuneration for directors, and there is no need to confirm it by an additional vote during a shareholders' meeting. This would be time consuming and costly*. However, six out of the 16 participants said that the rule of advisory voting should be clearly expressed by the Code of Best Practices.

Seven participants (out of 29) declared that shareholders should have the right to approve directors' remunerations, and that *the exercise of this right might stop further increases, which bear very little relationship to company performance or shareholder returns*. This group of participants were mainly composed of shareholders and employees. There was one management board president and one company lawyer<sup>900</sup> amongst them. They both emphasised that *the excessive*

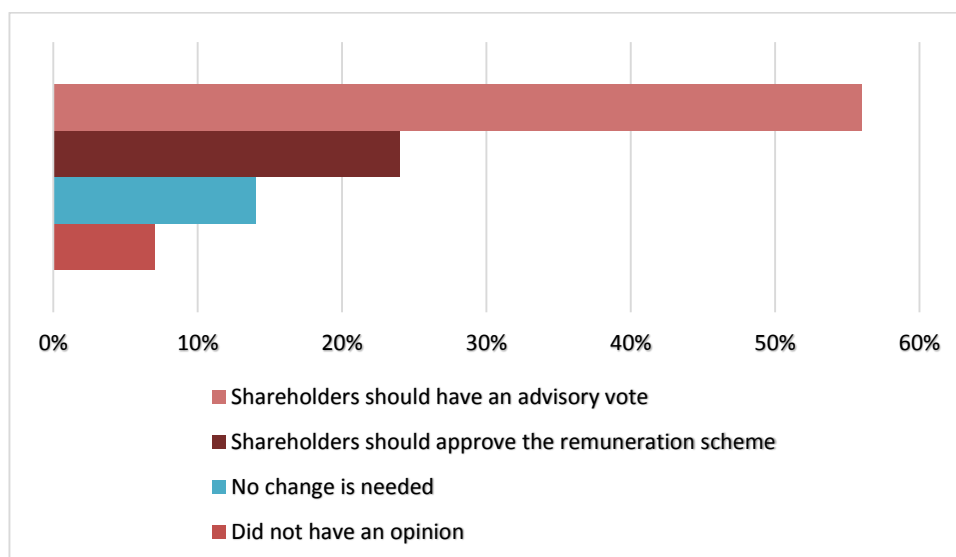
---

<sup>899</sup> One management board member – text to n 772.

<sup>900</sup> One company lawyer – text to n 816; and one management board president – text to n 796.

*directors' remunerations are – in their opinion – the most serious weakness of the Polish system of corporate governance.*

The remaining six participants (one shareholder and sole entrepreneurs) either said that *the current regulation had worked well enough* (four participants) or did not have any opinion about the issue (two participants).



**Chart 5.** Opinions on setting a remuneration policy in Poland

16 participants (out of 29 participants who answered my first question) also answered to my second question: ‘Is there any issue in the remuneration policy for corporate officials that – in your opinion – requires amendments? Please justify your answer.’

A significant number of participants (14 in total; mainly board members and shareholders) *emphasised how important a role a remuneration committee has in the process of setting remunerations*. According to them, *some efforts should be made to bring remuneration committees into general use* (see section concerning board committees in this chapter and section ‘Other Board Issues’ in chapter V).

One vice-president of a management board<sup>901</sup> suggested that *shareholders should give approval for share-based remuneration schemes, as well as the remuneration statement*.

Finally, members of supervisory boards complained about their low remunerations (see Appendix 10), which do not provide any incentive for them. For example, one president of a supervisory board<sup>902</sup> said the following:

*‘Only some supervisors view their work as a challenge and as an opportunity to gain*

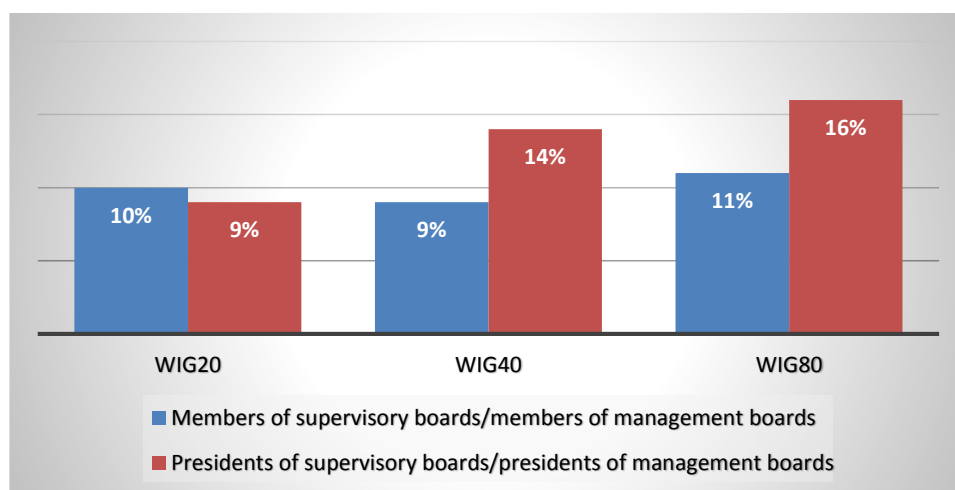
<sup>901</sup> Text to n 211.

<sup>902</sup> Text to n 836.

*additional knowledge and experience. For the majority of specialists, the financial aspect is essential, and therefore competitive and motivating remuneration has an impact on the efficiency of supervisory boards. If the level of remuneration is not motivating, accordingly the engagement of supervisors is low, which results in the lower efficiency of the supervisory board.'*

In this regard, PricewaterhouseCoopers<sup>903</sup> states that there is no relation between the scale of responsibility of supervisors, the company's profit and their remuneration. There is also too large a disproportion between the remunerations of supervisors and directors<sup>904</sup>.

**Chart 6.** Relationships between the remuneration of members and presidents of supervisory boards to members and presidents of management boards<sup>905</sup>



One of my interviewees – a head of an audit committee<sup>906</sup> – observed that *supervisors do not receive additional remuneration for work in committees, which is standard for directors of companies listed on the London Stock Exchange*. In general, PricewaterhouseCoopers<sup>907</sup> reports that supervisors in Poland earned much less than directors abroad.

For a president of a supervisory board<sup>908</sup>, *small remunerations is one of the reasons why foreigners do not want to work on Polish supervisory boards*.

Surprisingly, only two shareholders mentioned *disclosure of director's remuneration as an issue that should to be taken into deeper consideration by the government in Poland*. On the other

<sup>903</sup> PwC, 'Rady Nadzorcze 2013. Skuteczność (...)' (n 539).

<sup>904</sup> *ibid.*

<sup>905</sup> *ibid.*

<sup>906</sup> One supervisory board member – text to n 854.

<sup>907</sup> PwC, 'Rady Nadzorcze 2013. Skuteczność (...)' (n 539).

<sup>908</sup> Employed by a JSC, and interviewed in October 2012.



hand, it should be remembered that it (remuneration disclosure) has statutorily been regulated with respect to listed companies, which are obliged to disclose information on directors' remuneration (for members of management and supervisory boards). Both shareholders hold shares in an LLC, and this form of doing business is not embraced by this regulation. They both declared that *an absence of legal regulations that would oblige management of LLCs to disclose this sort of information may create an opportunity for fraud and increase the disproportion in pay between senior managers and the workforce*. In their opinion, *it might be one of the biggest problems of corporate governance in Poland*.

## I. THE DISCLOSURE SYSTEM IN POLAND

Participants did not mention the issue of disclosure of corporate information while discussing remunerations. Thus, in order to find out what they consider a disadvantage of the disclosure system in Poland and what they would like to change in this system, I asked them the following question:

- **What do you think of Poland adopting merit-based system?**

**Corporate disclosure is mainly regulated on a voluntary basis in Poland, but there is a set of basic mandatory standards to ensure that the minimum requirements will be met by companies with respect to corporate transparency [see Chapter V]. There are however legal systems where the statutory approach to disclosure is dominant [see more in Chapter III – ‘The Disclosure System in Singapore’].**

- **What would you like to change in the disclosure system in Poland?**

**Please justify your answers.**

None of the participants interviewed via a questionnaire responded to my second question. During unstructured interviews (see chapter II ‘Research Methodology’, where I elaborate on the process of data collection during interviews), when I suggested that the provision requiring listed companies to disclose directors' remuneration might also be extended to JCSs (see chapter V, in which I explain that, in Poland, such an obligation is only imposed on listed companies), eight board members said that *this is something that would be worth taking into consideration*. The other six participants were not sure whether this was a good idea. None of the 14 participants who took part in my unstructured interviews proposed a change to the disclosure system in Poland.

29 participants (out of 37) answered my first question. The other participants received a questionnaire and they left this question blank.

Out of the 29 participants who answered, 19 do not think that any change to the currently existing disclosure system is necessary. As one president of a supervisory board<sup>909</sup> said, *‘too many rules and regulations stifle the entrepreneurial spirit, and too few rules leave the investing public unprotected against unscrupulous business practices.’* This person also *referred to, and compared the Singaporean MAS to the Polish Financial Supervision Authority (FSA), highlighting that they bear a resemblance to each other.* Like the MAS, the FSA is a body that is responsible for overseeing the development of the financial market in Poland. *Inter alia*, issuers are required to lodge their prospectus with the FSA, which may refuse them the right to register if they do not meet the requirements regulated by Polish law.<sup>910</sup> Such a provision is also included in Singaporean law (see section ‘The Disclosure System in Singapore’ in chapter III).

The other participants did not explain their viewpoint in detail. In this group there were the other board members, two employees and three shareholders.

Out of the ten remaining participants, six did not have an opinion on the issue of corporate disclosure, and four said they *would rules relating to corporate disclosure to be tightened up, as it improved companies’ transparency.* In this group, there were eight shareholders, one members of a professional partnership (pharmacy) and one sole entrepreneur.

In general, participants expressed minimal interest in my questions concerning the disclosure system in Poland.

## J. THE ‘COMPLY OR EXPLAIN’ PRINCIPLE IN POLAND

The aim of my last question was to determine what the participants thought of the ‘comply or explain’ character of the Polish Code of Best Practices and the possibility of the implementation of the ‘apply or explain’ approach. The main reason why I decided to ask the question to my research participants is the reform of South African compliance framework (see section ‘Hybrid Corporate Governance’ – ‘The ‘Apply or Explain’ Principle’ in chapter III), embodied in the King Code of Governance for South Africa 2009, as well as the fact that the American Congress statutorily regulated a part of corporate provisions in the SOX act (see section “‘Comply or Else’ Vs. ‘Comply or Explain’” in chapter III). This suggests that the ‘apply or explain’ approach, which, *inter alia*, South Africa took, may not become dominant in corporate governance in the world. Thus, I asked the

---

<sup>909</sup> *ibid.*

<sup>910</sup> See Art. 21 (onward) of the Act on Public Offering (...) and Public Companies.

following questions:

- **What do you think of the functioning of the ‘comply or explain’ principle in Poland?**
- **What do you think of changing the ‘comply or explain’ principle to the ‘apply or explain’ principle in Poland?**

The ‘apply or explain’ principle assumes that boards can decide to apply recommendations differently or apply an alternative practice, but still this should attain the objective of the primary corporate governance principles.

25 participants in total responded to my questions. The other participants received a questionnaire and did not answer these questions (for further explanation concerning the data collection process during my research, see chapter II ‘Research Methodology’). All the respondents expressed a positive opinion about the application of the ‘comply or explain’ principle in Poland, but only some wished to discuss this issue in detail.

One board member<sup>911</sup> listed the following merits of the non-binding character of the Polish Code of Best Practices:

- *Companies choose practices that fit their needs.*
- *It might cut the cost of running a business significantly.*
- *It reduces the participation of regulatory authorities to minimum standards.*
- *The flexibility of the approach involves greater competition both within the company and at national level.*

On the other hand, one participant<sup>912</sup> said that *the ‘comply or else’ approach is recommended for the integration process of developing countries, such as Poland. ‘It is better for client protection and the conducting of government reconstruction plans. The companies’ structure and practices are similar to competent authority’s structures and practices’* – the participant reported.

Only six participants (four board members, one corporate lawyer and one employee) expressed their opinion on the implementation of the ‘apply or explain’ approach in Poland, two of whom (board members) were of the opinion that it might bring chaos to the idea of corporate governance: *‘If the ‘apply or explain’ approach was taken in Poland, the implementation of the provisions of the Code of Best Practices might be a challenge for interpreters. They would certainly*

---

<sup>911</sup> A member of the management board of an LLC, interviewed in January 2014.

<sup>912</sup> One management board president – text to n 727.

*interpret particular provisions in a different way’ (a supervisory board president<sup>913</sup>). For one of them (a management board vice-president<sup>914</sup>), the ‘apply or explain’ approach in Poland might also decrease the ratio of compliance with the Code of Best Practices.*

One employee<sup>915</sup> declared the following: *‘The adaptation of the approach requires that stakeholders be regularly updated. Whilst the Dutch code requires listed companies to provide an explanation for deviations, the other countries merely require a statement for disclosing of non-conformance. The Dutch code deserved greater attention from the Polish government.’*

The lawyer<sup>916</sup> pointed out that *the Code of Best Practices had been criticised in Polish legal doctrine<sup>917</sup> for being too strongly focused on the procedural rules of corporate governance and neglecting the introduction and promotion of general guidance (principles of conduct) for shareholders and company organs, such as the loyalty principle, corporate opportunity doctrine or the business judgment rule. ‘It seems like the WSE would have to revise the current ‘Best Practices’, and give them a completely different shape’ – the person said.*

## K. CONCLUSIONS

This chapter is an analysis of interviews conducted in Poland with 37 business practitioners, and develops my discussion on corporate governance in Poland began in chapter V. For this reason I include findings from my doctrinal research in some sections.

This chapter aims to answer all my three research questions, namely:

- What are the weaknesses of Polish corporate governance?
- What changes should be made to corporate governance in Poland?

and above all:

- Is a hybrid corporate governance model a realistic choice for Poland?

Section B deals with the issue of concentrated ownership and control in Poland. Sections C, D and F are dedicated to board matters, eg the independence of supervisors, the presence of employees and women on boards and board committees. In Section E, I ask my participants about

---

<sup>913</sup> Text to n 855.

<sup>914</sup> Text to n 801.

<sup>915</sup> Text to n 866.

<sup>916</sup> One company lawyer – text to n 816.

<sup>917</sup> See Adam Opalski, ‘Nowe Dobre Praktyki w spółkach publicznych’ (2008) 3 Przegląd Prawa Handlowego 14.

the possibility of implementing the American or British corporate governance models in Poland. In Section G, I go back to the issue of enlightened shareholder value in Poland. Sections H and I focus on the issue of remuneration policy in Polish companies. Section I is mainly dedicated to the disclosure of remuneration in Poland. In Section J, my participants express their opinion on the application of the 'comply or explain' principle in Poland, as well as the newest approach to corporate compliance, eg introduced in South Africa, namely the 'apply or explain' concept.

My opinion on each of these issues is expressed in the following chapter. I also elaborate on my research limitations and delimitations in the next chapter.

## VII. CONCLUDING REMARKS

Polish corporate governance is a traditionally two-tier board system comprising a supervisory board and a management board. The management board runs the day-to-day business of the company and is responsible for issues that are not vested in the supervisory board and the shareholders' meeting. The supervisory board supervises the management board and oversees the company's financial statements (for further explanation see chapter V).

As a matter of fact, the supervisory board might also be a management organ. Various sources<sup>918</sup> provide that the main characteristic of Polish corporate governance system is a high concentration of ownership and control, where controlling shareholders extend their influence through the supervisory board (I explain this in detail in chapters V and VI).

Indeed, the ownership structure of Polish companies amounts to 40% on average, while this is below 2% in Anglo-Saxon companies<sup>919</sup>. In companies in which the State Treasury holds shares, the ratio can even be higher and amounts to 90% (see Appendix 5).

The main act regulating corporate governance in Poland is the Company Code of 2000. Under its provisions, the supervisory board usually appoints and removes members of the management board in a JSC<sup>920</sup>, and the statutes may provide for its broader scope of powers<sup>921</sup>. Both boards might exclusively be composed of the shareholders, as the Code does not prohibit that.

The Company Code of 2000, as well as other statutes regulating corporate governance in Poland, often give general idea and principles rather than concrete solutions. This only increases the power of controlling shareholders, as it gives them a legal basis for having private benefits of control at the expense of the minority shareholders. As a consequence, conflicts between majority shareholders and minority shareholders are very common for Polish companies.<sup>922</sup>

Among other things, the Code of Best Practices has been passed to mitigate the difficulties that corporate governance in Poland faces, eg the appointment of independent supervisors aimed to bring some objectivity to the decision making process in companies<sup>923</sup>. This, however, cannot weaken the highly concentrated ownership structure of Polish companies. Companies have no obligation to comply with the Code's provisions. They are only obliged to report non-compliance if they decide to depart from its recommendations. Moreover, the Code of Best Practices regulates

---

<sup>918</sup> See, for example, Tamowicz & Dierżanowski (n 8).

<sup>919</sup> Morck & Steier (n 25).

<sup>920</sup> Art. 368§2 and 4CCC.

<sup>921</sup> Art. 384§1CCC.

<sup>922</sup> See, for example, Oplustil & Radwan (n 7) 455.

<sup>923</sup> Dzierżanowski & Tamowicz (n 8).

the functioning of listed JSCs exclusively<sup>924</sup>.

Taking this all into account, the main undertaking of my research became to search for solutions within foreign legal systems that would equalise right of all shareholders in Poland. My attention was drawn to countries where the so-called hybrid changes to corporate governance have been implemented. In particular, I became interested in the newest changes to corporate governance in Japan and South Africa (they are elaborated in chapter III – ‘Literature Review’, as well as other hybrid solutions, which implemented in Malaysia and Singapore).

The South African King Code Committee, for example, introduced the stakeholder inclusivity concept, which imposes on the board of directors the obligation to consider ‘the legitimate interests and expectations of stakeholders on the basis that this is in the best interests of the company, and not merely as an instrument to serve the interests of the shareholder’ [shareholder enlightened theory]<sup>925</sup>. For some observers<sup>926</sup>, nature, society (ie all subjects that might have an influence on a company’s performance or are influenced by a company’s performance) and business are interrelated in compound ways, and therefore should be taken into account by corporate decision makers. However, for their opponents this stakeholder theory includes too many subjects into the notion of a stakeholder<sup>927</sup>.

In general, South Africa has been considered a leader in global competitiveness surveys for its good corporate governance practices<sup>928</sup>. However, there is no data that would show how effective the new approach to stakeholders in South Africa has been.

Surveys that found a positive relationship between corporate social performance and corporate financial performance have been conducted in the US (see section ‘Shareholder Value’ in chapter IV), where legislators passed laws that impose on companies an obligation to take non-shareholder stakeholders into consideration while making strategic decisions<sup>929</sup>. This is the ‘shareholder enlightened value’, which has also been expressed in the UK Companies Act of 2006 with respect to directors’ duties<sup>930</sup>.

In Japan, the government installed an additional model of corporate governance for entrepreneurs. This means that they can now choose the way in which they want to manage their companies. In fact, the Japanese concept was the main inspiration for my research.

The new Japanese model was copied from the US, so it includes executives responsible for day-to-day management and directors who are the monitoring body. In addition, committees are

---

<sup>924</sup> Preamble of the Code.

<sup>925</sup> King (n 34).

<sup>926</sup> R. Khoza in Albert Luthuli Centre, ‘Interview Summary Report (...)’ (n 203).

<sup>927</sup> Tullberg in *ibid*.

<sup>928</sup> *ibid*.

<sup>929</sup> Luoma & Goodstein (n 42).

<sup>930</sup> Section 172, Part 10, Chapter 2.

an integral part of this model – especially: auditing, appointment and remuneration committees. Each committee is composed of at least three directors, of which a majority have to be outsiders.<sup>931</sup>

The new approach was forced by an influx of foreign investors from Europe and the US in the 1990s<sup>932</sup>. Before, companies in Japan were largely owned by the so-called ‘stable shareholders’. Stable investors hold their shares mainly to strengthen and grow stable business relations rather than to earn on their investments.<sup>933</sup> Since they are not focused on maximising their profits, managers do not put much effort into improving company performance<sup>934</sup>.

By 2008, the one-tier board model was only adopted by forty seven first section TSE listed companies, comprising 2.7% of all the listed companies<sup>935</sup>. It was believed that it might enhance the effectiveness of the company’s internal governance mechanism<sup>936</sup>. There is also an opinion that further hybridisation might be the future of Japanese corporate governance. It should combine the best elements of the board management and monitoring models.<sup>937</sup>

In Malaysia, the Malaysian Bursa (stock exchange) imposed mandatory training on senior management<sup>938</sup>. Importantly, Malaysia is deeply rooted in the common law tradition, where the government tends to leave corporate issues to the discretion of companies<sup>939</sup>.

Mandatory training was in force in Malaysia for four years until 2005, when it was repealed. As Khoo<sup>940</sup> reports, the initiative turned out to be too costly. Conversely, Koh and Ngee<sup>941</sup> maintain that this change in corporate governance was the most rewarding for companies in Malaysia; it enhanced directors’ professionalism through constant reskilling<sup>942</sup>.

The Singaporean government introduced changes to the corporate disclosure system. This reformed system assumes that there has to be a set of basic mandatory standards, and in addition to that companies should be encouraged in a voluntary way to adopt a set of best practices. As a consequence, Singapore chose an approach that is similar to the system that exists in the UK and Canada<sup>943</sup>.

Overall, both the Malaysian and Singaporean corporate models have been situated at or

---

<sup>931</sup> Yoshikawa (n 62).

<sup>932</sup> Nitta (n 309).

<sup>933</sup> See, for example, Charkham (n 304). For further explanation see section ‘Hybrid Corporate Governance in Japan’ in chapter III.

<sup>934</sup> Yoshikawa (n 62).

<sup>935</sup> Mizuno & Tabner (322).

<sup>936</sup> Yoshikawa (n 62).

<sup>937</sup> Aronson (n 66).

<sup>938</sup> Philip Koh Tong Ngee (n 50).

<sup>939</sup> *ibid.*

<sup>940</sup> Khoo (n 367).

<sup>941</sup> Philip Koh Tong Ngee (n 50).

<sup>942</sup> *ibid.*

<sup>943</sup> Tan Wee Liang (n 60); see also chapter III.



near the top of the most prestigious rankings in Asia<sup>944</sup>.

The above-mentioned changes created a new phenomenon in world corporate governance, called 'hybridisation'. As I stated in chapter III, in the most general way, hybrid corporate governance can be defined as follows: a combination of local and (or) foreign elements<sup>945</sup> or a combination of objects from different jurisdictions<sup>946</sup>.

I became curious about whether hybrid corporate governance could be successfully implemented in Poland. The idea of borrowing law from different legal systems is familiar in Poland. While Polish law has long been under the influence of both German and French law for historical and cultural reasons (with certain recent noticeable influences from Anglo-American law), the Company Code of 2000 is fundamentally based on the German and Austrian legal tradition<sup>947</sup>. However, the legislative inspirations in this area also include the Netherlands, Belgium, France, Hungary and Slovenia<sup>948</sup>. In addition, the statutory laws have been to some extent overlapped by legal practice applied by large law companies, the majority of whom are either part of a multinational chain or have borrowed Anglo-Saxon *modus operandi* and know-how<sup>949</sup>.

Moreover, while working on the currently binding Company Code of 2000, the Polish government has already considered the possibility of the implementation of a one-tier board model in Poland. According to its proposal, entrepreneurs would have a choice between the currently existing two-tier board system (in force since the pre-war times) and a one tier-board system. In the end, however, the government decided to stick to the traditional approach.<sup>950</sup>

On top of that, the Code of Best Practices of 2002 required at least half of supervisory board members to be independent members, which was described as an 'attempt to transplant the Anglo-Saxon concept of independent directors into the Polish system'<sup>951</sup>. This far-reaching approach to the concept of independence was abandoned in 2005, when the required number of independent members in companies where the majority shareholder holds more than 50% of the total votes was changed to a minimum of two<sup>952</sup>.

Both versions of the Code granted independent members special veto rights with regard to some resolutions of the supervisory board (resolutions approving related party transactions)<sup>953</sup>. In

---

<sup>944</sup> KPMG, 'Singapore's Corporate Governance (...)' (n 59); Asian Corporate Governance Association, 'Country Rankings (...)' (n 394); IMD World Competitiveness Center (n 395 and 396).

<sup>945</sup> Gonzalez (n 217).

<sup>946</sup> Dolowitz & Marsh (n 219).

<sup>947</sup> Sołtyński (n 10 and 11).

<sup>948</sup> Oplustil & Radwan (n 7) 467.

<sup>949</sup> *ibid* 469.

<sup>950</sup> *ibid* 473.

<sup>951</sup> *ibid* 490.

<sup>952</sup> The Code of Best Practices 2005, point 20.

<sup>953</sup> Oplustil & Radwan (n 7) 490.

fact, this amendment proved to have only a limited influence on the acceptance of the rule by the companies<sup>954</sup>.

Since 2005 the government has not attempted to make any changes to corporate governance that could be called hybrid. In addition, the Code of Best Practices 2007 repealed enlightened shareholder value, leaving the determination of company interest up to the managers, commentators and ultimately to the courts (see chapter III 'Hybrid Corporate Governance in Poland').

The Code of Best Practices of 2007 also failed to equip independent board members with the right to vet specific operations. Since then, all that is required is the participation of a minimum two independent members on the supervisory board regardless of the ownership structure of a company<sup>955</sup>.

In addition, I noticed that the corporate disclosure system in Poland shows a significant similarity to the Singaporean disclosure based system (see section concerning the Singaporean system in chapter III). Thus, this is a mixed compliance framework, with the prevalence of voluntarily binding provisions. I was still interested in whether Polish business practitioners find this approach appropriate for corporate practice in Poland. I was also interested in whether they would like to see a change in the area of corporate governance in Poland. I was particularly interested in the issue of excessive remunerations for corporate officials in Poland and the absence of obligation to disclose their size in annual reports (for further explanation see chapter V). Moreover, my doctrinal research revealed that this is a common problem for companies all over the world (see chapter IV, where I analyse this issue, particularly focusing on the American and British corporate remunerations disclosure).

This issue, as well as other problematic aspects of corporate governance that I came across while investigating the issue of hybrid corporate governance, gave me the idea of examining corporate hybridisation from the Polish perspective. I formulated the following research questions:

- 'What are the weaknesses of the Polish corporate governance system?',
- 'What changes should be made to corporate governance in Poland?', and
- 'Is hybrid corporate governance a realistic choice for Poland?'

In order to answer these questions, I conducted interviews with business people in Poland. It should be added that the issue of hybridisation had not been researched in Poland (see section 'Hybrid Corporate Governance in Poland' in chapter III – for further explanation). Therefore, I could not restrict myself to reviewing only business literature about this issue (see chapter II – 'Research Methodology', which, among other things, is split into doctrinal and non-doctrinal research, and in

---

<sup>954</sup> *ibid.*

<sup>955</sup> Part III, point 6.

which I explain why I applied both approaches to my research).

At this point, it is worth noting that, prior to the interviews and my literature review of hybrid corporate governance in Poland, I reviewed all the available literature concerning the phenomenon of hybrid corporate governance. With respect to corporate governance in Poland, I conducted a literature review on this topic until August 2014 (the date of my thesis submission), as I wanted to keep myself up to date with any changes to Polish law which might have occurred in this area<sup>956</sup>.

I arranged 37 interviews in four regions in Poland (in fact, more entrepreneurs were involved in this project, but eventually they withdrew from it; in particular, chapter II explains the process of data collection during these interviews). My interviewees were board members (14), minor shareholders (11), employees (2), members of professional partnerships (4) and sole entrepreneurs (6). I felt it was important to me to interview people with either a vast knowledge of corporate governance or extensive experience in running a business in Poland. The latter group was composed of persons whose business has a close relationship with a limited company in Poland, eg suppliers.

The first issues that were raised during the interviews concerned the high consolidation of share ownership and supervision in Polish companies.

For the majority of interviewees, the privatisation procedures are the main reason for the consolidation of share ownership and control in companies established in Poland. They also declared that it had been damaging for the overall functioning of business in Poland. A research participant<sup>957</sup> observed that the other means of leveraging corporate control, eg non-voting shares, super majorities, 'squeeze out', etc, might actually work in favour of business. This reflects the findings of my doctrinal research (see also chapters V and VI, where I analyse these issues in detail).

The participants had different opinions about the actual scope of permitted actions of supervisory boards in Poland. In the opinion of the majority of board members I interviewed, supervisors in Polish companies have no authority over directors. Only four participants (out of 17 who answered my question; three shareholders and one director – a member of a management board<sup>958</sup>) felt that the management board is often instructed by the supervisory board, which actually performs the role of management (for details, see sections regarding supervisory boards in Poland in chapters V and VI). These two opinions would actually comply with my doctrinal findings. I have mentioned that some sources, eg business prospectuses, do not mention that the

---

<sup>956</sup> The Polish transition from centrally planned to market economy had an impact on business law in Poland, which has been gradually changed. Another reason for changes in business law was Poland's accession to the EU in 2004. As a consequence, changes to law in Poland have been very common.

<sup>957</sup> One management board member – text to n 772.

<sup>958</sup> Text to n 789 and 791.

distribution of powers within the corporate governance model in Poland are not well balanced. In particular, the dominance of the largest investors in Polish companies is brushed aside. Other sources, however, elaborate on this issue excessively<sup>959</sup>.

In order to protect the rights of minority shareholders against abuse by shareholders, a common practice is to include independent directors/supervisors in corporate governance (see, for example, chapter IV, where the role and importance of independent directors in the US and the UK is explained)<sup>960</sup>. As I pointed out in chapter V, the approach to independence within corporate governance in Poland has changed to the detriment of minority shareholders over the last 20 years. Therefore, I asked participants whether they would like the regulation concerning the appointment of independent supervisors in Poland to be amended, and to which extent the concept of independent supervisors in Polish corporate governance has influenced the functioning of supervisory boards in Poland.

All my interviewees (39 participants, including two persons who withdrew from participating in this research, but partially filled my questionnaire and returned it to me) unanimously agreed that independent supervisors have provided objective criticism to company management. However, for the majority of them (see Chart 2 in chapter VI), the current regulation of the Code of Best Practices (that requires at least two independent supervisors regardless of the company ownership structure) is satisfactory. On the other hand, a significant number of participants (see Chart 2 in chapter VI) took the stance that at least half of supervisors should be required to be independent. Here, it should be emphasised that I attached a brief description to my question, in which I referred to the requirements of the UK Corporate Governance Code. This might have had an impact on their opinion (see section 'The Independence of Supervisors' in chapter VI).

In addition, three employees declared that all members of the supervisory board should be independent (see chapter VI), but it might be difficult to make this idea in Poland. According to one vice-president of a management board<sup>961</sup>, there is a shortage of corporate professionals who are qualified enough to be appointed as independent supervisors. This might lead to either appointing 'pseudo' independent supervisors in order to meet the requirements of the Code of Best Practices, or to an increase in non-compliance with the independence rule among companies.

In my opinion, the British solution is reasonable, as it brings better protection for the rights of minority shareholders in Poland. Two independent supervisors are not enough to assure such protection in companies in which the ownership is concentrated in the hands of a few shareholders. In such a case, independent supervisors may be a lot less powerful than controlling shareholders, since they have no right to veto the supervisory board's resolutions. They may not be able to defend

---

<sup>959</sup> See, for example, Dzierżanowski & Tamowicz (n 8).

<sup>960</sup> See also, for example, Cadbury Report (n 233).

<sup>961</sup> Text to n 801.

the company's interests at all.

The number of corporate misappropriations might also be decreased by implementing the one-tier board system of corporate governance in Poland, as an alternative to the currently binding two-tier board system.

According to one shareholder (research participant)<sup>962</sup>, in countries with consolidated ownership and control, it would be possible to mitigate conflicts between the shareholders and the board through a unitary system, in which the goals and objectives of companies are largely defined by the majority shareholder. In another participant's<sup>963</sup> opinion, this is achievable on condition that an appropriate number of independent supervisors/directors are appointed in companies. Thus, the interests of minority shareholders can be taken into consideration, which does not usually happen in companies where the controlling shareholders have an influence on the process on decision-making in the key issues. Despite the fact that, in theory, minority shareholders in the two-tier board system should have a better opportunity to express their interests through the supervisory board, this does not usually happen in Poland – where companies are dominated by the largest shareholders.<sup>964</sup>

In general, La Porta *et al.*<sup>965</sup> state that legal systems that adopt the unitary board system are considered to have good protection of shareholders' rights, which encourage a diverse shareholder base in companies.

The unitary model – with fewer organisational layers – might produce fewer information asymmetries and lessen bureaucratic hurdles that might hinder the decision-making process on two-tier boards<sup>966</sup>. On the other hand, executive and non-executive directors working on one board might jeopardise that board's ability to monitor executive directors and provide independent advice to management<sup>967</sup>.

Another advantage of the unitary board structure is the fact that all directors (executive or non-executive) have equal legal status and equal responsibilities under the law, which in general enhances accountability of the system<sup>968</sup>. However, it should be remembered that this did not save certain American and British companies, eg Enron, WorldCom or Polly Peck, from complete collapse due to the illegal actions of some of their directors<sup>969</sup>.

In contrast, in the two-tier board system, the absence of trust in the relationships between

---

<sup>962</sup> Text to n 807.

<sup>963</sup> One management board member – text to n 810.

<sup>964</sup> *ibid.*

<sup>965</sup> La Porta *et al.* (n 22).

<sup>966</sup> According to one shareholder – text to n 809.

<sup>967</sup> According to one shareholder – text to n 812.

<sup>968</sup> According to one company lawyer – text to n 816.

<sup>969</sup> See, for example, Mallin (n 27) 1-11.

the supervisory and the management boards may cause problems. However, such problems may also occur in the one-tier board model, where executive directors may be reluctant to co-operate with all or some non-executive directors. In addition, in both systems, there may be insufficient commitment on the part of the board members with respect to performing their supervisory duties<sup>970</sup>.

Interestingly, all participants who answered my question concerning the implementation of the one-tier board system in Poland and justified their answers (17 out of 37; for further explanation see section 'The One-Tier Board System in Poland' in chapter VI) agreed that the Anglo-Saxon countries could benefit from adopting the unitary board system, which would enable dispersed shareholders express their expected goals for the company via supervisory boards, particularly when their interests differ<sup>971</sup>. As one shareholder<sup>972</sup> said, '(t)he supervisory board would be responsible for supervising and ensuring the management board to establish company's goals on behalf of the shareholders and to identify the common interest of shareholders.'

There is a clear separation of power in the two tier board model, but the Polish case proves that there can be a weak information flow between the management and the board – as well as and information asymmetry – to the disadvantage of the supervisory board<sup>973</sup>. In particular, the fact that supervisors have to rely on the management board as a source of information may increase the risk of manipulation and filtering of information by the directors<sup>974</sup>. Further aggravating this situation, there is strict adherence to the collegiality rule within supervisory boards. Laws do not empower individual supervisors to request directors to present certain information or reports to the supervisory board. This may be detrimental to the effectiveness of supervision, as it may limit the board's reactions and responses to negative occurrences in the company's affairs.<sup>975</sup> The lack of information may also be an obstacle to taking legal action against directors' malpractice<sup>976</sup>.

With respect to a faster information flow between corporate bodies, in chapter IV, I referred to the issue of separation of the CEO and Chair roles. According to research<sup>977</sup>, an absence of such a separation eliminates the problem of information asymmetries, as both positions are held by the same person. On the other hand, a CEO who is at the same time a chairman may lack the scepticism necessary to scrutinise information that is screened and filtered by a CEO who does not hold the position of Chair prior to that information being provided to the board<sup>978</sup>. This may slow down the

---

<sup>970</sup> Oplustil & Radwan (n 7) 480.

<sup>971</sup> According to one management board member – text to n 814, and one shareholder – text to n 815.

<sup>972</sup> *ibid.*

<sup>973</sup> Oplustil & Radwan (n 7) 480; see also section 'The Supervisory Board in Poland' – 'The Scope of Power' in chapter VI.

<sup>974</sup> *ibid.*

<sup>975</sup> *ibid.*

<sup>976</sup> According to one shareholder – text to n 792.

<sup>977</sup> Harris & Helfat (n 489).

<sup>978</sup> Vo, 'Rating Management Behavior and Ethics (...)' (n 479).

board's decision making process and stop it from adopting new strategies to meet changing business environment<sup>979</sup>. Each of these opinions should be taken into account while considering the implementation of the one-tier board system in Poland.

Since there is no perfect system of corporate governance, I believe that it is reasonable to give Polish entrepreneurs the possibility to opt for an optimum model (be in one-tier or two-tier) to fit the particular needs of a given company. This would create flexibility and promote Poland (in the eyes of Anglo-Saxon countries) as a convenient place for doing business – as there would be no need to familiarise themselves with a new legal system. It should be added that Poland can also be an attractive place of destination for overseas business, as it is a country with relatively cheap labour<sup>980</sup>. It is doubtful that the cost of maintenance for the National Court Register (company's register in Poland) would increase, unless the implementation is associated with a sudden increase of applications for registration. Finally, four high-profile corporate officials<sup>981</sup> (out of nine, see section 'Legal Transplant in Polish Corporate Governance') declared that it would be possible to transplant any of the Anglo-Saxon models of corporate governance in Poland directly – without any changes in their structure, as foreign investors had brought a new corporate culture to Poland, eg a new management cultures, and there has been a considerable change in economic and legislative terms in Poland. For example, the Cadbury Code provisions became an integral part of the Polish corporate system. In addition, there is now external control of the market in the form of commodity, financial, take-over and other markets. Thus, the internal supervision of Polish companies may now be weaker.<sup>982</sup>

The advocates of the two-tier board system argue that the legal form of a European Company let companies in Poland operate through the unitary system. However, we need to remember that an SE can only be established by large companies, which are already operating in more than one EU Member State<sup>983</sup>.

In total, 19 participants (out of 37 who took part in my research) answered my question concerning the implementation of the one-tier board model in Poland, out of whom two participants had no opinion about the issue. 13 interviewees (board members) were pessimistic about implementing an additional board system in Poland. However, they did not radically oppose

---

<sup>979</sup> Baliga (n 483).

<sup>980</sup> See, for example, Adam Turek, 'Siemoniak: „Polska jest jednym z najlepszych miejsc do inwestowania”. Ale naszą przewagą wciąż jest tania siła robocza' (*Inn Poland*, January 2015) <[innpoland.pl/114329,siemoniak-polska-jest-jednym-z-najlepszych-miejsc-do-inwestowania-jest-sie-z-czego-cieszyc](http://innpoland.pl/114329,siemoniak-polska-jest-jednym-z-najlepszych-miejsc-do-inwestowania-jest-sie-z-czego-cieszyc)> accessed 25 March 2015; Tomasz Gryniewicz, 'Polska promuje się tanią siłą roboczą. Taki mamy klimat, przegrywamy z USA' (*biztok*, 1 July 2014) <[www.biztok.pl/gospodarka/polska-promuje-sie-tania-sila-robocza-taki-mamy-klimat-przegrywamy-z-usa\\_a16782](http://www.biztok.pl/gospodarka/polska-promuje-sie-tania-sila-robocza-taki-mamy-klimat-przegrywamy-z-usa_a16782)> accessed 25 March 2015; Tomasz Molga and Szymon Krawiec, 'We are the Chinese of Europe' (*Voxeurop*, 23 October 2013) <[www.voxeurop.eu/en/content/article/4259621-we-are-chinese-europe](http://www.voxeurop.eu/en/content/article/4259621-we-are-chinese-europe)> accessed 24 March 2015

<sup>981</sup> Text to n 836 and 837.

<sup>982</sup> *ibid.*

<sup>983</sup> Text to n 804.

such a solution. Only four interviewees (including one board member, one employee of a professional partnership – a corporate lawyer, and two minority shareholders) were enthusiastic about this idea (for details see section ‘The One-Tier Board System in Poland’ in chapter VI). If we assume that the statistics reflect the opinion of all business participants in Poland, this means that, again, the majority of them expressed their commitment to the traditional approach to corporate governance. In fact, corporate governance literature had suggested about such a possibility. For example, Oplustil and Radwan<sup>984</sup> declared: ‘(...) the two-tier board model is deeply rooted in the Polish legal system and any deviation from that model – even should the law finally allow for choice in corporate self-governance – might encounter reluctance on the side of practitioners caught on the path of dependence.’

The next issue that I raised during the interviews was board committees. I decided to ask my interviewees about board committees because the literature considers their absence in the majority of Polish companies to be a weakness of Polish corporate governance (see section ‘Other Board Issues’ in chapter VI). I also, several times in this thesis, emphasise Anglo-Saxon countries’ adherence to the committee system, as well as the adherence of countries whose legal system is based on the Anglo-Saxon legal tradition several times in this thesis, eg elaborating on hybrid corporate governance in South Africa.

In Poland, board committees may be appointed on supervisory boards<sup>985</sup>. An audit committee is only obligatory in larger listed companies<sup>986</sup>. There is no obligation to include a remuneration committee on supervisory boards.

According to my interviewees (11 out of the 37 who took part in my interviews), some effort should be made to increase the use of committees in companies, as they:

- enable supervisors to discuss some important issues more thoroughly in a smaller team of professionals;
- provide supervisory boards with greater control and knowledge of the most crucial areas of the company’s operation;
- give supervisors the chance to express their opinions on particular issues and propose recommendations;
- keep the entire board’s work in order.

(for details see subsection ‘Board Committees on the Supervisory Board’). As Polish doctrine has

---

<sup>984</sup> Oplustil & Radwan (n 7) 473.

<sup>985</sup> The Code of Best Practices, Part III, point 6.

<sup>986</sup> The Act of 29 May 2009 on Statutory Auditors – Art. 86, point 1. For details see section ‘Other Board Issues’ in chapter V and ‘Other Board Committees’ – ‘Board Committees on the Supervisory Board’ in chapter VI.



also criticised the lack of interest in the issue of board committees<sup>987</sup>, I believe that this is something that will be taken into consideration by the government in the nearest future.

In contrast, the majority of interviewees who answered my question concerning board committees (eight out of the mentioned above 11) were of the opinion that the voluntary binding regulation is satisfactory and that committees should not operate on a statutory basis. In their opinion, including an obligation to establish board committees on supervisory boards in Poland might be too costly and superfluous, as companies with smaller boards might not need them. At this point, it is worth mentioning that board committees also operate on the 'comply or explain' basis in the common law systems (see chapters III and IV).

The majority of interviewed business practitioners also opposed appointing employees, bank representatives and women to supervisory boards in Poland. I asked a question concerning such an appointment for the following reasons:

- one of my interviewees<sup>988</sup> wished to discuss with me the issue of board diversity and employee appointment during my pilot interviews in July 2012;
- in Germany, the Cromme Code of 2000 includes the possibility for bank representatives to sit on the supervisory board of German corporations (for further explanation see chapter VI – the section concerning the presence of bank representative on boards in Poland, and section 'Legal Transplant for Polish Corporate Governance' in chapter VI, in which I explain that the primary source of inspiration was German corporate law);
- Rodrigues<sup>989</sup> points out that an important precursor to independence of thought is diversity and proposes that increasing the degree of heterogeneity among board members would improve the quality of board oversight (for details see chapter IV);
- in the middle of 2011, the European Parliament called on EU states to reserve 30% of seats on boards for women until 2015 and 40% until 2020<sup>990</sup>;
- a number of countries in Europe either enacted legislative measures aimed at improving gender balance on company boards, or obliged companies to include a certain percentage of women on boards (for further information see chapter IV)<sup>991</sup>;
- the participation of women on supervisory boards of listed companies in Poland may need to be reviewed, as it is not high (for details see 'Other Board Issues' in chapter V)<sup>992</sup>.

---

<sup>987</sup> See, for example, PwC, 'Rady Nadzorcze 2013. Skuteczność (...)' (n 539). See also sections about board committees in chapters V and VI.

<sup>988</sup> Text to n 529.

<sup>989</sup> Rodrigues (n 531).

<sup>990</sup> PwC, 'Rady Nadzorcze 2013. Skuteczność (...)' (n 539)

<sup>991</sup> European Commission, 'Women in Economic Decision-Making (...)' (n 541).

<sup>992</sup> PwC, 'Rady Nadzorcze 2013. Skuteczność (...)' (n 539).

Thus, all interviewees who answered my question regarding board diversity (38 in total) were positive about the fact that a larger number of women could sit on boards. However, in their opinion, this issue should be left to the discretion of companies. As one supervisory board president<sup>993</sup> declared, board members should only be recruited on the basis of their qualifications and work experience. None of my interviewees was able to answer whether greater board diversity would have a positive impact on independence in the decision making process. In my opinion, a law that would oblige companies to appoint a prescribed number of people who may not be as qualified as other potential candidates for this role can be harmful for business.

On the other hand, research (for details see section 'Board Diversity' in chapter IV) reveals that the participation of women in corporate governance may cause a fundamental change in the boardroom and enhance corporate governance, eg the content of boardroom discussion is more likely to include difficult issues. In addition, it has a positive effect on the financial performance of companies. Finally, the above-mentioned Rodrigues's<sup>994</sup> opinion deserves greater attention and, probably, a discussion within the Polish business environment.

Employees (and suppliers) in Poland have a statutory right to select a specified number of supervisory board members (workers' codetermination). This right applies only to companies subject to indirect privatisation and allows the workers to elect two-fifths of the supervisory board members directly<sup>995</sup>.

Out of 37 participants (the total number of participants who took part in my research), 16 answered that the rule should not be broadened out into the other companies in Poland. Of the remaining 21 participants, 14 gave one of the following answers: 'I am not sure', 'I do not think this is a good idea', 'I do not think so', or 'I doubt it would improve the functioning of corporate governance' (for further explanation, see section about the participation of employees on supervisory boards in Poland in chapter VI).

According to one shareholder<sup>996</sup>, employees on supervisory boards in Poland bring some 'outside' perspectives to the board, as well as the technical knowledge of the company's subject of activity. They facilitate communication and mutual understanding between the governing body and the workforce<sup>997</sup>, and they 'identify themselves more closely with the company'<sup>998</sup>. On the other hand, as it was aptly noticed by one supervisory board president<sup>999</sup>, employees on the board might jeopardise the internal consistency of the board and initiate conflicts amongst its members.

---

<sup>993</sup> Text to n 883.

<sup>994</sup> Rodrigues (n 531).

<sup>995</sup> See Articles 12–16 of the Act of 30 August 1996 on the Privatisation Act.

<sup>996</sup> Text to n 865.

<sup>997</sup> According to one employee – text to n 866.

<sup>998</sup> According to one management board president – text to n 869.

<sup>999</sup> Text to n 867.

Therefore, I believe that their presence on supervisory boards in Poland should be dependent on a company's shareholders' meeting.

With respect to banks, my doctrinal research findings show that their impact on companies' dealings and decision-making reveals that they had a weak influence on corporate governance of public companies in the years 1999-2002<sup>1000</sup>. In this period, supervisory boards of almost half of surveyed companies had at least one bank representative – usually the major creditor of a given company. However, banks are rather reluctant to engage themselves in the decision making process in companies to whom they extend credit<sup>1001</sup>. Słomka-Gołębiowska's<sup>1002</sup> explains this by the rational aversion to legal risk associated with a conflict of interests and the risk of a violation of the rules prohibiting insider dealing.

My research participants show minimal interest in responding to the questions concerning bank participation on supervisory boards in Poland. As a consequence, only one participant (shareholder)<sup>1003</sup> (out of 15 who answered my question concerning banks' participation in corporate governance) declared that banks should have their representatives on the supervisory board. It is, however, in the opinion of this person, superfluous for the government to regulate this by the Company Code, as companies have already been given the possibility of appointing bank representatives by not prohibiting shareholders to sit on supervisory boards (the same answer was given by those participants who were against banks' participation in boards). This participant did not explain why – in his opinion – banks should have their representatives on boards. The remaining 14 participants took the stance that companies should decide about the composition of the supervisory board.

Taking into account the outcome of my doctrinal research in this area<sup>1004</sup>, it is doubtful that an obligation to include bank representatives on supervisory boards in Poland would escalate the problem of consolidated ownership and control, and abuse of minority rights by large shareholders (see chapters V and VI, where I analyse this issue in detail). However, I agree with the above-mentioned shareholder that such a regulation would be superfluous, given the fact that such a provision actually exists in the Company Code of 2000. Moreover, legislative works on a new provision might also turn out to be costly.

It is interesting that only a small number of participants expressed their opinion about an issue as crucial to companies as the participation of banks and employees in company management. On the other hand, we need to take into consideration that not all participants who did not respond

---

<sup>1000</sup> Słomka-Gołębiowska (n 877).

<sup>1001</sup> *ibid.*

<sup>1002</sup> *ibid.*

<sup>1003</sup> According to one shareholder – text to n 876.

<sup>1004</sup> Słomka-Gołębiowska (n 877).

are directly connected with a limited company. They are either members of a partnership or people who work for the small businesses, and have a business relationship with limited companies. Thus, they might not have a vast knowledge of those issues or might not be interested in them, as they are not directly connected with their business.

Interestingly, all the participants (38 out of 38; one participant withdrew from my research, but returned a partially completed questionnaire) answered my question on gender diversity on the supervisory board. The reason for this may be the fact there have been cases of discrimination of women in the workplace<sup>1005</sup>, which has recently been discussed in various media. This is thus an issue that may have been well-known to my participants.

The issue of corporate training also drew the attention of my interviewees. I asked them a question concerning the obligatory system of training for corporate officials in order to refer to Malaysian reform of the training system (see section 'The Unique System for Training Directors in Malaysia' in chapter III). I asked the following questions: Do you think that training for board members should be obligatory? Is training for board members essential for running a business?

With respect to the latter, 17 respondents out of 34 (37 participants in total participated in my research project) were of the opinion that such training has a significant meaning for companies because:

- it enables board members to discharge their duties more efficiently, which may improve the overall company performance.
- continuous training and skill enhancement for directors may improve the flow of information between management and supervisory boards in Poland, as directors are not currently obliged to provide supervisors with information regarding the company's operation (see section 'Other Board Issues' in chapter V).

All 34 participants declared that a decision about training for board members should be left to the discretion of the company. They explained that obligatory training might either be too costly for companies or superfluous, and, in fact, is against business freedom.

Nevertheless, I think that one shareholder's<sup>1006</sup> opinion, that the WSE could impose on listed companies an obligation to organise mandatory training for directors only and in some areas only (the most crucial for a company's life), deserves special attention. Even more so, if we take into account that it may really increase the training participants' awareness of the importance of their role and, as a result, for example, improve the flow of information between boards in companies. In my opinion, Khoo's<sup>1007</sup> suggestion that the government could give tax incentives to companies in

---

<sup>1005</sup> See, for example, [www.cpk.org.pl](http://www.cpk.org.pl) (Women's Right Centre).

<sup>1006</sup> Text to n 887.

<sup>1007</sup> Khoo (n 367).

order to encourage them to implement a constant re-skilling system for corporate officials is also interesting.

Another issue that I raised during my interviews was enlightened shareholder value in Poland, which I decided to discuss with my participants in the context of South African ‘stakeholder inclusivity’ (see section ‘Hybrid Corporate Governance in South Africa’ in chapter III). I asked what they think of adopting this concept in Poland and of legal regulating enlightened shareholder value, as it was repealed by the Code of Best Practices of 2007.

17 participants out of 24 who responded (from the 37 participants who took part in my research) believe that it should be explicitly expressed in the Code of Best Practices, as it has already been captured by various statutes (and court jurisdiction) (see chapter VI for further explanation). For one of the remaining participants<sup>1008</sup>, the economic interests of stakeholders should not be prioritised before the interests of shareholders as a group. In contrast, four participants think that the current regulation is sufficient, and that South African stakeholder inclusivity should not be adapted in Poland. As one of shareholders<sup>1009</sup> declared, stakeholder inclusivity is impossible to execute, because it embraces too many stakeholders. The other participants were against implementing stakeholder inclusivity in Poland, but did not justify their answer.

Importantly, South African practitioners also expressed negative (and similar) opinions about stakeholder inclusivity (see chapter III). In addition, Adam<sup>1010</sup> raised the point that stakeholder inclusivity may, in fact, mean the same as shareholder enlightened value.

In my view, these controversies should become subject of a deeper discussion on this aspect of corporate governance – at the international level. This might be an area for new research, as there is no current publication that has discussed this issue in detail, providing examples from real corporate life.

I believe that the issue of executive remunerations also needs to be reviewed in Poland, where there is a large disproportion between corporate remunerations, and where the directors’ remuneration is alarmingly excessive (see chapter V). Meanwhile, it bears little relationship to company performance or shareholder returns (see chapters V and VI, as well as chapter IV, where I discuss the same problem with respect to the US and the UK). Taking this all into consideration, I asked interviewees whether shareholders should receive the right to approve remuneration for directors, as it has become a way of acting against these occurrences in some countries (see, for example, chapter IV – ‘Corporate Governance in the United States and the United Kingdom’). I also asked about what changes they would like to introduce to the remuneration policy in Poland.

Out of 29 participants who answered my questions, seven declared that it should not be

---

<sup>1008</sup> One management board member – text to n 895.

<sup>1009</sup> Text to n 897.

<sup>1010</sup> Albert Luthuli Centre, ‘Interview Summary Report (...)’ (n 203).

mandatory to put the remuneration policy and the remuneration report to vote by shareholders. As it was aptly noticed by them, shareholders decide about the composition of the supervisory board, which is responsible for setting the remuneration policy (see chapter V). Thus, shareholders already participate in setting the remuneration policy in Poland. Six other participants declared that shareholders should have the right to approve directors' remunerations, and that it might halt the increase of directorial remunerations. In my opinion, given those disproportions in pay and the extensive power of controlling shareholders in Poland, this solution could be implemented in Poland for a temporary period of time.

Two other solutions concerning corporate remunerations are worth taking into consideration in Poland, namely:

- the proposal of approving share-based remuneration schemes by shareholders (it is currently provided for in the Code of Best Practices, which means that companies may but are not obliged to include it in their statutes)<sup>1011</sup>; and
- the solution of suspending payments where performance has been poor – also recommended by the Code of Best Practices<sup>1012</sup> (for details see chapter IV).

They should both be included into the universally binding provisions in Poland. However, none of my participants suggested that this would be possible with respect to poor management performance.

On the other hand, one participant<sup>1013</sup> drew attention to the low remunerations of supervisors, when compared with directorial remunerations (PricewaterhouseCoopers' research, conducted in 2012, revealed the same – see chapter VI). In this person's opinion, it stops foreigners from applying for supervisor positions in Polish companies. I believe that this is another issue that deserves the attention of the legal doctrine and the business environment.

Moreover, the system of disclosing remunerations is also a problematic issue in Poland and needs to be reviewed. Under law<sup>1014</sup>, limited companies are only obliged to inform the public about the size of remunerations. The information is revealed annually – together with the annual financial statements. The law does not apply to non-listed and limited liability companies, which might be reluctant to disclose such information.

In general, companies are encouraged to choose principles that they want to apply to their disclosure policy. However, there is a set of mandatory standards that guarantee the minimum of corporate transparency (for further information see chapters V and VI). In this regard, one

---

<sup>1011</sup> According to a vice-president of a management board – text to n 901, see also part I, point 5 of the Code of Best Practices of 2010.

<sup>1012</sup> The Code of Best Practices of 2010, *ibid*.

<sup>1013</sup> One supervisory board president – text to n 908.

<sup>1014</sup> Regulation on the current and periodic disclosures (...) – §95 sec. 6, point 17

participant<sup>1015</sup> compared this system to the Singaporean disclosure-based approach to corporate governance. For example, the Polish Financial Supervision Authority was compared to the MAS. Both organs are regulated statutorily, and responsible for overseeing the development of the financial market.

As one supervisory board president (research participant)<sup>1016</sup> noticed, ‘too many rules and regulations stifle the entrepreneurial spirit, and too few rules leave the investing public unprotected against unscrupulous business practices.’ However, I am not entirely certain whether the government should not revise the set of mandatory laws provided for companies, as it might not be enough to protect minority shareholders from the abuse of their rights by large shareholders. Indeed, four participants out of 29 who answered my question regarding corporate disclosure, wished to tighten up the disclosure system. Six participants did not have any opinion about the issue, and the remaining 19 were pleased with the currently binding system (for details see chapter VI). Thus, it seems to be an issue that deserves considerable attention from the government, as well as the Polish legal doctrine and the business environment in Poland.

My last question concerned the use of the ‘comply or explain’ principle in Poland, and the possibility of the implementation of the ‘apply or explain’ approach. The main reason why I decided to ask the question to my research participants is the reform of South African compliance framework, embodied in the King Code of Governance for South Africa 2009, as well as the fact that the American Congress statutorily regulated a part of corporate provisions in the SOX act. This suggests that the ‘apply or explain’ approach, which, inter alia, South Africa took, may not become dominant in corporate governance in the world. I was interested in what Polish business people think of the recent changes to the compliance framework, and whether they would like some changes to be implemented in Poland with respect to this issue.

According to the ‘comply or explain’ principle, companies have to state in their annual reports whether they comply with the code of best practices, identify any areas of non-compliance and explain the reasons in light of their own particular circumstances<sup>1017</sup>. In contrast, the ‘comply or else’ approach to law means that cases of non-compliance with provisions are sanctioned.

I asked my participants about the functioning of the ‘comply or explain’ principle in Poland, and 25 (all who responded) out of 37 expressed a positive opinion about the approach, as:

- companies might choose practices that fit their needs,
- it might cut the cost of running business,
- it reduces the participation of regulatory authorities to minimum standards, and
- the flexibility of the approach enhances competition between companies.

---

<sup>1015</sup> One supervisory board president – text to n 909.

<sup>1016</sup> *ibid.*

<sup>1017</sup> See, for example, the preamble of the Polish Code of Best Practices of 2010. See also other codes of best practices.

One participant<sup>1018</sup> said that the ‘comply or else’ approach is recommended for the integration process of developing countries, such as Poland.

I also asked my participants what they think of changing the ‘comply or explain’ principle to the ‘apply or explain’ principle in Poland. The ‘apply or explain’ principle assumes that boards can decide to apply recommendations differently or apply an alternative practice, but this should still attain the objective of the primary corporate governance principles<sup>1019</sup>. However, according to my participants (only six participants expressed their opinion on the implementation of the ‘apply or explain’ approach in Poland), this concept might bring chaos to the idea of corporate governance in Poland and create a real challenge for interpreters of the code of best practices, as they would certainly interpret particular provisions in a different way. For one interviewee<sup>1020</sup>, the ‘apply or explain’ approach in Poland might also decrease the ratio of compliance with the Code of Best Practices. The advantage of the approach is – as another participant<sup>1021</sup> noticed – that, for example, in the Netherlands, it requires regular reports to stakeholders for critically scrutinise.

One participant<sup>1022</sup> also suggested that the Code of Best Practices of 2010 should be more focused on the introduction and promotion of general guidance (principles) for shareholders. This participant mentioned the loyalty principle and business judgement rule. Unless the first can be inferred from a number of provisions of the Company Code of 2000, the absence of the judgment rule in Polish corporate law means that law does not specify the principles on which directors should base their performance, eg in other countries directors act on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company<sup>1023</sup>. There is thus too much discretion left in the hands of directors in Poland. In practice, courts of law resolve problems resulting from this state of affairs, on condition that a lawsuit is filed against a director’s wrongdoing (for details see chapter V).

At this point, I would also like to add that a solution that Polish business might profit from is the instrument of whistle-blowing in identifying management fraud. As I have already mentioned in chapter III (see this chapter for further information on whistle-blowing) whistle-blowers are not paid informants who are legally protected from reprisals. In my opinion, an idea worthy of consideration is passing a law that would require listed companies to have a whistle-blowing agenda, as top management might not be motivated enough to install a whistle-blowing programme, since it is a cost item.

---

<sup>1018</sup> One management board president – text to n 912.

<sup>1019</sup> See, for example, King (n 34).

<sup>1020</sup> One management board vice-president – text to n 914.

<sup>1021</sup> One employee of a JSC – text to n 915.

<sup>1022</sup> One company lawyer – text to n 916.

<sup>1023</sup> See, for example, Stephen M. Bainbridge, *Corporation Law and Economics* (Foundation Press 2002) 269; see also Chapter V for further explanation of the issue.



In total, I asked 20 questions during my structured interviews. I asked identical questions during my unstructured interviews. Alongside my doctrinal research, the interviews enabled me to answer my all three research questions. As a consequence, I determined the weaknesses of corporate governance in Poland and discussed, with my participants, possible changes to the Polish corporate governance model. In particular, I managed to determine that the majority of participants are reluctant to accept such radical changes as, for example, the implementation of the one-tier board system in Poland. There is also a small group of business participants (mainly shareholders) who are very enthusiastic about the possibility of further hybridisation of Polish corporate governance (see chapter V 'Corporate Governance in Poland' in particular).

My interviewees come from various regions of Poland. At the time of the interviews, they were either employed in managerial positions or were non-managerial participants in a business (shareholders, employees, members of partnerships and individual entrepreneurs), which had a close relationship with Polish limited companies. In total, I interviewed 37 people, of whom half were corporate officers and the other half were business participants. This is the reason why I believe my research to be a representative sample and could reasonably be said to reflect the opinion of all business practitioners in Poland.

However, I would like to emphasise that, initially, my plan was to conduct interviews with a larger number of business people. This turned out to be impossible, as business practitioners kept rejecting their participation in this project.

I also experienced difficulties while trying to collect certain information, as it sometimes only was available in the national language of a particular nation or not available at all, eg I did not collect a large amount information on the Malaysian system of obligatory training. Overall, however, I managed to collect enough data in order to conduct a cohesive discussion on particular issues.

The word count limit also turned out to be an obstacle while performing this research, as it did not enable me to develop several issues in this thesis, eg I limited the analysis of the Polish corporate governance structure to a minimum. Therefore, if I decided to conduct this research again, I would narrow my analysis down to the possibility of implementing the two-tier board system in Poland and broadened the range of my interviewees into people working in legislative committees in Poland, which might enable me to expand the section on the direct transplant of the Anglo-Saxon model of corporate governance (see chapter VI – section 'Legal Transplant in Polish Corporate Governance'). This, however, means that I would not elaborate on such issues as, for example, the corporate disclosure system.

At this point, it should be added that the issue of corporate disclosure was not analysed in a detailed manner in this thesis. The reason for this is that my interviewees showed a minimal interest in discussing this issue. For some corporate officials, this might have been an

uncomfortable topic to discuss, for example, due to their excessive remunerations, which they do not want to be revealed. The other participants might not have had enough knowledge of this issue to conduct a conversation about it. Overall, the fact that my research participants did not wish to discuss the corporate disclosure system in Poland affected my thesis (this issue is not as developed as some other issues), but not the outcome of my research, as – I have already explained in chapter III – the issue of corporate disclosure is not directly associated with hybrid corporate governance. It was included in my research due to the fact that it might be perceived as a weakness of the Polish corporate governance system (see chapter V for further explanation). For the same reason I raised the issue of the ‘comply or explain’ principle in Poland in chapter VI. It was also appropriate because of the controversies linked to regulating some key corporate matters statutorily in the US, which created the most significant difference between the American and British one-tier board systems of corporate governance. One of the sections in chapter IV is dedicated to this issue and its impact on the performance of corporate governance.

This research is only dedicated to limited companies, where the agency problem comes into play. Under the Company Code of 2000, some partnerships may establish corporate organs, which are regulated by the same provisions as corporate governance of limited companies<sup>1024</sup>. Moreover, partnerships are suitable for small business, and are not incorporated. Since each partner is liable for obligations of the partnership without limitation, the ownership structure is far less consolidated than in limited companies. Thus, all the problems that trouble limited companies at the management level, might not be present in the majority of partnerships.

Finally, in order to present the core aspects of hybrid corporate governance worldwide in depth, I limited a review of the issue to eighty articles and a few countries.

The objectives of this research were the following:

- to systematise and develop knowledge on hybrid corporate governance, and
- to contribute to knowledge on legal transplant.

I believe that I achieved these objectives. In the doctrinal part of this thesis, I compile information on hybrid corporate governance around the world. Meanwhile, the set of 37 interviews brings some practical knowledge on corporate governance in Poland and legal transplant worldwide. In particular, two sections of chapter VI that are dedicated to the possibility of implementing the one-tier board system in Poland (see sections ‘The One-tier Board System in Poland’ and ‘Legal Transplant in Polish Corporate Governance’) are – in my opinion – valuable contributions to knowledge of hybrid corporate governance and legal transplant.

I would also like to emphasise that the research provides several topics for journal articles.

---

<sup>1024</sup> Art. 97 and 142-145CCC; see also Appendix 3.

One of them could be, for example, a comparative analysis of the Polish and the Anglo-Saxon board models of corporate governance. Data collected during this research would be sufficient to write an essay on this topic.

In a time when large companies create multinational chains, governments have to implement standards that are internationally recognisable and protect companies from failure, as this may affect the lives of the whole society and the overall performance of the economy. A good example are best practices of corporate governance that are applied across the world and often have the same prototype, eg the Cadbury Code, the OECD principles, EU recommendations, etc. This leads to the convergence in this area of law<sup>1025</sup>, and makes research on corporate governance internationally applicable. I also believe that the outcome of this research might turn out to be useful while considering changes to corporate governance in other countries.

---

<sup>1025</sup> See, for example, Mallin (n 27) 22-23.

# BIBLIOGRAPHY

## A

- Agora, 'Statut Agory Spółki Akcyjnej' <[www.agora.pl/agora/1,110747,10427459,Statut\\_Agory\\_Spolki\\_Akcyjnej.html#TRNavSST](http://www.agora.pl/agora/1,110747,10427459,Statut_Agory_Spolki_Akcyjnej.html#TRNavSST)> accessed 25 July 2014
- Albert M, *Capitalism Against Capitalism* (Whurr Publishers 1993)
- Albert Luthuli Centre for Responsible Leadership, 'Interview Summary Report Compiled by Jess Schulshenk' (University of Pretoria, August 2012) <[web.up.ac.za/sitefiles/file/2013\\_alcrl\\_Interview%20summary%20report%20web.pdf](http://web.up.ac.za/sitefiles/file/2013_alcrl_Interview%20summary%20report%20web.pdf)> accessed 4 April 2013
- Allen F and Gale D, *Comparing Financial Systems* (MIT Press 2000)
- Allison JWF, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (Clarendon Press, 1996)
- Aluchna M, 'Does Good Corporate Governance Matter? Best Practice in Poland' (2009) 32 (2) Management Research News 185
- Anandarajah K, 'Whither Corporate Governance in Singapore – Are Smaller Cap Companies Worst Off?' *Pulses* (Singapore, April 2005)
- Andreasson S, 'Understanding Corporate Governance Reform in South Africa: Anglo-American Divergence, the King Reports and Hybridization' (December 2011) <[www.works.bepress.com/cgi/viewcontent.cgi?article=1007&context=stefan\\_andreasson](http://www.works.bepress.com/cgi/viewcontent.cgi?article=1007&context=stefan_andreasson)> accessed 2 February 2013
- Aoki M, Patrick H and Sheard P, 'The Japanese Main Bank System: An Introductory Overview' in Aoki M and H Patrick (eds), *The Japanese Main Bank System: Its Relevance for Developing and Transforming Economics* (Oxford University Press 1994)
- Arcot S and Bruno V, 'In Letter Not in Spirit: An Analysis of Corporate Governance in the UK', London School of Economics, Working Paper No. 031, 2006
- Arcot S and Faure-Grimaud A, 'Corporate Governance in the UK: Is the Comply or Explain Approach Working? (2010) 30 International Review of Law Economics 193
- Armour J and McCahery JA (eds), *After Enron. Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Hart Publishing 2006)
- Armstrong P, Segal N and Davies B, 'Corporate Governance: South Africa, a Pioneer in Africa' (The South African Institute of International Affairs, 2005) <[www.saiia.org.za/images/upload/Corporate\\_Gov\\_3May12005final.pdf](http://www.saiia.org.za/images/upload/Corporate_Gov_3May12005final.pdf)> accessed 13 February 2013

- Aronson BE, 'Fundamental Issues and Recent Trends in Japanese Corporate Governance Reform: A Comparative Perspective' (2014) *Hastings Business Law Journal* (forthcoming) <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2448076](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2448076)> accessed 25 June 2014
- Arping S and Sautner Z, 'Did SOX Section 404 Make Firms Less Opaque? Evidence from Cross-Listed Firms' (1 August 2012) <[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1561619](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561619)> accessed 18 March 2013
- Asian Corporate Governance Association, 'Country Rankings: "CG Watch"' (2005) <[www.acga-asia.org/public/files/ACGA\\_Fidelity\\_talk\\_April05.pdf](http://www.acga-asia.org/public/files/ACGA_Fidelity_talk_April05.pdf)> accessed 23 September 2013
- Asian Productivity Organization, (Tokyo, 2007) <[www.apo-tokyo.org/publications/files/ind-20-bp\\_acg.pdf](http://www.apo-tokyo.org/publications/files/ind-20-bp_acg.pdf)> accessed 16 June 2012

## B

- Bainbridge SM, *Corporation Law and Economics* (Foundation Press 2002)
- Bakan J, *The Corporation* (Constable & Robinson 2004)
- Baliga BR, Moyer RC and Rao RS, 'CEO Duality and Firm Performance: What's the Fuss?' (1996) 17 *Strategic Management Journal* 41
- Balsam S, Puthenpurackal J and Upadhyay A, 'The Determinants and Performance Impact of Outside Board Leadership' <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1361255](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1361255)> accessed 28 May 2014
- Bąk J and Oplustil K, 'Ius cogens w prawie spółki akcyjnej – analiza prawnoporównawcza' (2007) 2 *Czasopismo Kwartalne Całego Prawa Handlowego, Upadłościowego oraz Rynku Kapitałowego* 184
- Bebchuk L and Fried J, *Pay Without Performance: The Unfulfilled Promise of Executive Compensation* (Harvard University Press 2004)
- Becht M and Mayer C, 'Introduction' in Barca F and Becht M (eds), *The Control of Corporate Europe* (Oxford University Press 2001)
- Bell J, *Doing Your Research Project* (3rd edn, Oxford University Press 1999)
- Bell J, 'Legal Research and the Distinctiveness of Comparative Law' in Hoecke VM (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2013)
- Berger PL and Luekmann T, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor 1967)
- Berkowitz D, Pistor K and Richard JF, 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law* 163
- Berry MA and DA Rondinelli, 'Proactive Corporate Environment Management: A New

Industrial Revolution' (1998) 12 (2) Academy of Management Executive 38

- Bieniak J and others, *Kodeks Spółek Handlowych. Komentarz* (C.H. Beck 2011)
- Błaszczyk B, Hoshi I and Woodward R (eds), *Secondary Privatisation in Transition Economies: The Evolution of Enterprise Ownership in the Czech Republic, Poland and Slovenia* (Palgrave Macmillan 2003)
- 'BOMI: Przekroczenie progu 10% ogólnej liczby głosów w skutek udzielenia pełnomocnictwa' (*Bankier.pl*, 7 April 2013) <[www.bankier.pl/wiadomosc/BOMI-Przekroczenie-progu-10-ogolnej-liczby-glosow-w-wyniku-udzielonego-pelnomocnictwa-2882126.html](http://www.bankier.pl/wiadomosc/BOMI-Przekroczenie-progu-10-ogolnej-liczby-glosow-w-wyniku-udzielonego-pelnomocnictwa-2882126.html)> accessed 10 March 2014
- Boyd BK, 'CEO Duality and Firm Performance: A Contingency Model' (1995) 16 Strategic Management Journal 301
- Börzel TA and Thauer C (eds), *Business and Governance in South Africa: Racing to the Top?* (Palgrave Macmillan 2013)
- Brickley JA, Coles JL and Jarrell G, 'Leadership Structure: Separating the CEO and Chairman of the Board' (1997) 3 Journal of Corporate Finance 189
- Brown KM, 'New Demands, Better Boards: Rethinking Director Compensation in an Era of Heightened Corporate Governance' (2007) 82 New York University Law Review 1102
- Buckland WW and McNair AD, *Roman Law and Common Law* (Cambridge University Press 1936)

## C

- Cadbury A, 'Corporate Governance and Development' (Global Corporate Governance Forum, Washington 2004) <[www.gcgf.org/wps/wcm/connect/7fc17c0048a7e6dda8b7ef6060ad5911/Focus\\_1\\_Corp\\_Governance\\_and\\_Development.pdf?MOD=AJPERES](http://www.gcgf.org/wps/wcm/connect/7fc17c0048a7e6dda8b7ef6060ad5911/Focus_1_Corp_Governance_and_Development.pdf?MOD=AJPERES)> accessed 23 January 2013
- Caggiano C, 'Call Grows for Separation of CEO and Chairman Roles' (2004) 231 New Jersey Law Journal 5
- Campbell C and Wiles P, 'The Study of Law in Society in Britain' (1976) 10 Law & Society Review 547
- Carrington PD and King E, 'Law and the Wisconsin Idea' (1997) 47 Journal of Legal Education 297
- Carter DA, Simkins BJ and Simpson WG, 'Corporate Governance, Board Diversity, and Firm Value' (2003) 38 (1) Financial Review 33
- Caves RE and Uekusa M, *Industrial Organization in Japan* (Brookings Institution 1976)
- Charkham J, *Keeping Good Company: A Study of Corporate Governance in Five Countries* (Clarendon Press 1994)

- Charkham J, *Keeping Better Company: Corporate Governance Ten Years On* (Oxford University Press 2005)
- Chatterjee C, *Methods of Research in Law* (2nd edn, Old Bailey 2000)
- Clark RC, 'Corporate Governance Changes in the Wake of the Sarbanes Oxley Act: A Morality Tale for Policymakers Too' (2005) 22 Georgia State University Law Review 251
- Clarke T (ed), *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance* (Routledge 2004)
- Clement RW, 'The Lessons from Stakeholder Theory for U.S. Business Leaders' (2005) 48 Business Horizons 255
- Colaco HMJ, Myers P and Nitkin MR, 'Pathways to Leadership: Board Independence, Diversity and the Emerging Pipeline in the United States for Women Directors' (2011) 8 International Journal of Disclosure and Governance 122
- Commission of the European Communities, 'Commission Staff Working Document. Impact assessment on the Directive on the cross-border transfer of registered office' (Brussels, 2007)  
<[www.ec.europa.eu/internal\\_market/company/docs/shareholders/ia\\_transfer\\_122007\\_part1\\_en.pdf](http://www.ec.europa.eu/internal_market/company/docs/shareholders/ia_transfer_122007_part1_en.pdf)> accessed 23 July 2014
- Commission on Global Governance, *Our Global Neighbourhood* (Oxford University Press 1995)
- Conference Board, 'The Conference Board Commission on Public Trust and Private Enterprise' (2003) <[www.conference-board.org/pdf\\_free/SR-03-04-ES.pdf](http://www.conference-board.org/pdf_free/SR-03-04-ES.pdf)> accessed 29 December 2014
- Conley JM, 'CPR Perspective: Changing Corporate Behavior in a Socially Responsible Direction' (Centre for Progressive Reform, 2008)  
<[www.progressivereform.org/perspCorp\\_behav.cfm](http://www.progressivereform.org/perspCorp_behav.cfm)> accessed 15 June 2012
- Conyon MJ and Mallin C, *Directors' Share Options, Performance Criteria and Disclosure Compliance with the Greenbury Report* (ICAEW Research Board, London 1997)
- Conyon MJ and Sadler G, 'Shareholder Voting and Directors' Remuneration Report Legislation: Say on Pay in the UK' (2010) 18 (4) Corporate Governance: An International Review 296
- Corbin J and Strauss A, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd edn, Sage Publications 2007)
- Creswell JW, *Qualitative Inquiry and Research Design: Choosing Among Five Traditions* (Sage Publications 1998)
- Creswell JW, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (3rd edn, Sage Publications 2009)

- Creswell JW and Plano Clark VL, *Designing and Conducting Mixed Methods Research* (1st edn, Sage Publications 2007)
- Cromme G, 'Corporate Governance in Germany and the German Corporate Governance Code' (2005) 13 (3) *Corporate Governance: An International Review* 362
- Czarniawska B, *Narratives in Social Science Research* (Sage Publications 2004)

## D

- Dallas LL, 'The New Managerialism and Diversity on Corporate Boards' (2002) 76 *Tulane Law Review* 1363
- Dalton DR and Kesner IF, 'Composition and CEO Duality in Boards of Directors: An International Perspective' (1987) 18 *International Law Business Studies* 33
- Davies N, *Heart of Europe. The Past in Poland's Present* (Oxford University Press 2001)
- DeAndres P and Vallelado E, 'Corporate Governance in Banking: The Role of the Board of Directors' (2008) 32 (12) *Journal of Banking and Finance* 2570
- DeBeer E and Rensburg RS, 'Towards a Theoretical Framework for the Governing Stakeholder Relationships: A Perspective from South Africa' (2011) 11 *Journal of Public Affairs* 208
- Dellinger AB, 'Validity and the Review of Literature' (2005) 12 (2) *Research in the Schools* 41
- Deloitte Poland, 'Raport „Współczesna Rada Nadzorcza 2012”. Praktyka Ładu Korporacyjnego' (2012) <[www.gpw.pl/biblioteka-gpwwiecej?gpwl\\_id=84&title=Raport+%E2%80%9EWsp%C3%B3%C5%82czesna+Rada+Nadzorcza+2012%E2%80%9D+Praktyka+%C5%82adu+korporacyjnego+w+Polsce.](http://www.gpw.pl/biblioteka-gpwwiecej?gpwl_id=84&title=Raport+%E2%80%9EWsp%C3%B3%C5%82czesna+Rada+Nadzorcza+2012%E2%80%9D+Praktyka+%C5%82adu+korporacyjnego+w+Polsce.)> accessed 16 June 2014
- Deloitte, 'Singapore' (undated) <[www.iasplus.com/en/jurisdictions/asia/singapore](http://www.iasplus.com/en/jurisdictions/asia/singapore)> accessed 23 June 2014
- Denzin NK and Lincoln YS, *Handbook of Qualitative Research* (2nd edn, Sage Publications 2000)
- Denzin NK and Lincoln YS, *Strategies of Qualitative Inquiry* (4th edn, Sage 2011)
- Department for Business, Innovation & Skills, 'Executive Remuneration: Discussion Paper' (September 2011) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31660/11-1287-executive-remuneration-discussion-paper.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31660/11-1287-executive-remuneration-discussion-paper.pdf)> accessed 16 December 2013
- DeSilva S, 'Has the Disclosure Regime Failed?' *Business Times* (Singapore, 18 December 2004) 10
- Dobinson I and Johns F, 'Qualitative Legal Research' in McConville M and Chui WH, *Research Methods for Law* (Edinburgh University Press 2007)



- Dolowitz D and Marsh D 'Who Learns What from Whom: a Review of the Policy Transfer Literature' (1996) 44 Political Studies 343
- Donaldson T and Preston LE, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications' (1995) 20 Academy of Management Review 65
- Donc, 'Corporate Valuation, Corporate Disclosure & Corporate Governance' (*Oaktree Research*, 11 November 2003) <[www.oaktree-research.com/index.php?option=content&task=view&id=45](http://www.oaktree-research.com/index.php?option=content&task=view&id=45)> accessed 23 September 2013
- Dore R, *Stock Market Capitalism: Welfare Capitalism – Japan and Germany Versus the Anglo-Saxons* (Oxford University Press 2000)
- Dworkin R, *Law's Empire* (Fontana 1986)
- Dzierżanowski M and Tamowicz P, 'Ownership and Control of Polish Listed Corporations' (Gdańsk Institute for Market Economics, May 2003) <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=386822](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=386822)> accessed 9 September 2011
- Dziurzyński T, Fenichel Z and Honzatko M, *Kodeks Handlowy. Komentarz* (Grand Gamma 1995)

## E

- Eisenberg T, Sundgren S and Wells MT, 'Larger Board Size and Decreasing Firm Value in Small Firms' (1998) 48 Journal of Financial Economics 35
- Eisenhardt KM, 'Building Theories from Case Study Research' (1989) 14 (4) The Academy of Management Review 532
- Erhardt NL, Werbel JD and Shrader CB, 'Board of Director Diversity and Firm Financial Performance' (2003) 11 (2) Corporate Governance: An International Review 102
- Erkut S, Kramer VW and Konrad AM, 'Critical Mass: Does the Number of Women on a Corporate Board Make a Difference?' in Vinnicombe S, Singh V, Burke RJ, Bilimoria D and Huse M (eds), *Women on Corporate Boards of Directors: International Research and Practice* (Edward Elgar 2008)
- Ernst & Young, 'Revised Code of Corporate Governance' (2012) 12 Board Matters Quarterly <[www.ey.com/SG/en/Services/Assurance/Board-Matters-Quarterly---Issue-12---June-2012---Revised-Code-of-Corporate-Governance](http://www.ey.com/SG/en/Services/Assurance/Board-Matters-Quarterly---Issue-12---June-2012---Revised-Code-of-Corporate-Governance)> accessed 27 June 2014
- European Commission, 'Corporate governance in financial institutions and remuneration policies' (2 June 2010) <[www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0284:FIN:EN:PDF](http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0284:FIN:EN:PDF)> accessed 6 February 2014

- European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' (Brussels 2011) <[www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF](http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF)> accessed 26 July 2013
- European Commission, 'The EU corporate governance framework' (5 April 2011) <[www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0164:FIN:EN:PDF](http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0164:FIN:EN:PDF)> accessed 6 February 2014
- European Commission, 'Women in Economic Decision-Making in the EU: Progress Report. A Europe 2020 Initiative' (European Union, 2012) <[www.ec.europa.eu/justice/gender-equality/files/women-on-boards\\_en.pdf](http://www.ec.europa.eu/justice/gender-equality/files/women-on-boards_en.pdf)> accessed 28 June 2014
- European Commission, 'Commission adopts new standards to increase transparency over bankers' pay and risk profiles' (Brussels, 4 March 2014) <[www.europa.eu/rapid/press-release\\_IP-14-210\\_en.htm?locale=en](http://www.europa.eu/rapid/press-release_IP-14-210_en.htm?locale=en)> accessed 12 August 2014
- European Commission, 'Gender Balance in Decision-Making Positions' (27 June 2014) <[www.ec.europa.eu/justice/gender-equality/gender-decision-making/index\\_en.htm](http://www.ec.europa.eu/justice/gender-equality/gender-decision-making/index_en.htm)> accessed 25 May 2014
- European Commission, 'New Initiatives in Response to the Financial Crisis' (11 July 2014) <[www.ec.europa.eu/internal\\_market/company/directors-remun/index\\_en.htm](http://www.ec.europa.eu/internal_market/company/directors-remun/index_en.htm)> accessed 24 July 2014
- Ewald W, 'Comparative Jurisprudence (II): The Logic of Legal Transplant' (1995) 43 American Journal of Comparative Law 489

## F

- Farr J, 'Into the Great Wide Open' *IR Magazine* (Singapore, March 2006) <[www.IRontheNET.com/feature](http://www.IRontheNET.com/feature)> accessed 30 September 2013
- Federation of European Stock Exchanges, 'Share Ownership Structure in Europe' (December 2008) <[www.webcache.googleusercontent.com/search?q=cache:mGXByYUH1EoJ:www.fese.eu/en/%3Finc%3Dart%26id%3D8+&cd=1&hl=en&ct=clnk&gl=pl/](http://www.webcache.googleusercontent.com/search?q=cache:mGXByYUH1EoJ:www.fese.eu/en/%3Finc%3Dart%26id%3D8+&cd=1&hl=en&ct=clnk&gl=pl/)> accessed 28 March 2014
- Ferreira D, 'Board Diversity' in Baker HK and Anderson R (eds), *Corporate Governance, A Synthesis of Theory, Research and Practice* (The Robert W. Kolb Series in Finance, John Wiley & Sons Inc. 2011)
- Ferri F and Maber DA, 'Say on Pay Votes and CEO Compensation: Evidence from the UK' (2011) <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1420394](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1420394)> accessed 3 August 2014

- Finance Executives International, 'Fei Survey: Management Drives Sarbanes-Oxley Compliance Costs Down by 23%, But Auditors Fees Virtually Unchanged' (May 2007) <[www.web.archive.org/web/20071011142102/http://fei.mediaroom.com/index.php?s=press\\_releases&item=187](http://www.web.archive.org/web/20071011142102/http://fei.mediaroom.com/index.php?s=press_releases&item=187)> accessed 28 November 2013
- Financial Reporting Council, 'Internal Control: Revised Guide for Directors on the Combined Code' (October 2005) <[www.ecgi.org/codes/documents/frc\\_ic.pdf](http://www.ecgi.org/codes/documents/frc_ic.pdf)> accessed 7 February 2014
- Financial Reporting Council, 'The Combined Code on Corporate Governance' (June 2008) <[www.frc.org.uk/getattachment/1a875db9-b06e-4453-8f65-358809084331/The-Combined-Code-on-Corporate-Governance.aspx](http://www.frc.org.uk/getattachment/1a875db9-b06e-4453-8f65-358809084331/The-Combined-Code-on-Corporate-Governance.aspx)> accessed 27 March 2014
- Financial Reporting Council, 'Developments in Corporate Governance 2011. The Impact and Implementation of the UK Corporate Governance and Stewardship Codes' (London, December 2011) <[www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-2011-The-imp.aspx](http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-2011-The-imp.aspx)> accessed 20 November 2013
- Financial Reporting Council, 'What Constitutes and Explanation under 'Comply or Explain'? Report of Discussions Between Companies and Investors' (London, February 2012) <[www.frc.org.uk/Our-Work/Publications/Corporate-Governance/What-constitutes-an-explanation-under-comply-or-ex.aspx](http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/What-constitutes-an-explanation-under-comply-or-ex.aspx)> accessed 15 September 2013
- Financial Reporting Council, 'Feedback Statement. Revisions to the UK Corporate Governance Code and Guidance on Audit Committees' (London, September 2012) <[www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Feedback-statement-on-UK-Corporate-Governance-Code.aspx](http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Feedback-statement-on-UK-Corporate-Governance-Code.aspx)> accessed 20 November 2013
- Financial Reporting Council, 'Developments in Corporate Governance and Stewardship 2014' (London, January 2015) <[www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-and-Stewardsh.pdf](http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-and-Stewardsh.pdf)> accessed 16 March 2014
- Fink A, *Conducting Research Literature Reviews. From Paper to the Internet* (Sage Publications 1998)
- Finkelstein S and D'Aveni RA, 'CEO Duality as a Double-Edged Sword: How Boards of Directors Balance Entrenchment Avoidance and Unity of Command' (1994) 37 *Academy of Management Journal* 1079
- Fletcher GP, 'Comparative Law as a Subversive Discipline' (1998) 46 *American Journal of Comparative Law* 683
- Foley & Lardner LLP, 'Foley Studies Reveals Continued High Cost of Being Public' (2 August 2007) <[www.foley.com/foley-study-reveals-continued-high-cost-of-being-public-08-02-](http://www.foley.com/foley-study-reveals-continued-high-cost-of-being-public-08-02-)>

2007/> accessed 17 August 2013

- Frooman J, 'Socially Irresponsible and Illegal Behavior and Shareholder Wealth' (1997) 36 (3) Business & Society 221

## G

- Gedajlovic ET, Yoshikawa T and Hashimoto M, 'Ownership Structure, Investment Behavior and Firm Performance in Japanese Manufacturing Industries' (2005) 26 Organization Studies 7
- Gerlach ML, *Alliance Capitalism: The Social Organization of Japanese Business* (University of California Press 1992)
- Gingrich N and Kralik DW, 'Repeal Sarbanes-Oxley' (*SF Gate*, 5 November 2008) <[www.sfgate.com/politics/article/Repeal-Sarbanes-Oxley-3186747.php](http://www.sfgate.com/politics/article/Repeal-Sarbanes-Oxley-3186747.php)> accessed 12 October 2013
- Główny Urząd Statystyczny [Central Statistical Office], 'Przeciętne zatrudnienie i wynagrodzenie w sektorze przedsiębiorstw w marcu 2014 r.' <[www.stat.gov.pl/obszary-tematyczne/praca-wynagrodzenia/zatrudnienie-wynagrodzenie/przecietne-zatrudnienie-i-wynagrodzenie-w-sektorze-przedsiębiorstw-w-marcu-2014-r-,3,24.html](http://www.stat.gov.pl/obszary-tematyczne/praca-wynagrodzenia/zatrudnienie-wynagrodzenie/przecietne-zatrudnienie-i-wynagrodzenie-w-sektorze-przedsiębiorstw-w-marcu-2014-r-,3,24.html)> accessed 12 May 2014
- Gordon JN, 'The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices' (2007) 59 Stanford Law Review 1465
- Greenbury R, 'Directors' Remuneration. Report of a Study Group chaired by Richard Greenbury' (17 July 1995) <[www.ecgi.org/codes/documents/greenbury.pdf](http://www.ecgi.org/codes/documents/greenbury.pdf)> accessed 28 January 2014
- Grosvold J and Brammer S, 'National Institutional Systems as Antecedents of Female Board Representation: An Empirical Study' (2011) 19 (2) Corporate Governance: An International Review 116
- Gryniewicz T, 'Polska promuje się tanią siłą roboczą. Taki mamy klimat, przegrywamy z USA' (*biztok*, 1 July 2014) <[www.biztok.pl/gospodarka/polska-promuje-sie-tania-sila-robocza-taki-mamy-klimat-przegrywamy-z-usa\\_a16782](http://www.biztok.pl/gospodarka/polska-promuje-sie-tania-sila-robocza-taki-mamy-klimat-przegrywamy-z-usa_a16782)> accessed 25 March 2015
- Grzeszak A and others, 'Kraj rad (nadzorczych)' *Polityka* (Warsaw, 27 February 1999) <[www.archiwum.polityka.pl/art/kraj-rad-nadzorczych,390453.html](http://www.archiwum.polityka.pl/art/kraj-rad-nadzorczych,390453.html)> accessed 13 August 2011
- Gugler K, Mueller DC and Yurtoglu BB, 'Corporate Governance and Globalization' (2004) 20 (1) Oxford Review of Economic Policy 129
- Gutteridge HC, *Comparative Law* (Cambridge University Press 1949)
- Gutteridge HC, 'Review: Polish Commercial Law: Polish Science and Learning' (1942) 24 (2)

## H

- Hackethal A, Schmidt RH and Tyrell M, 'Banks and German Corporate Governance: On the Way to a Capital Market-Based System?' (2005) 13 (3) *Corporate Governance: An International Review* 397
- Hall PA and Soskice D (eds), *Varieties of Capitalism: the Institutional Foundations of Comparative Advantage* (Oxford University Press 2001)
- Harris D and Helfat CE, 'CEO Duality, Succession, Capabilities and Agency Theory: Commentary and Research Agenda' (1998) 19 *Strategic Management Journal* 901
- Hart C, *Doing a Literature Search: A Guide for the Social Sciences* (Sage Publications 2001)
- Havemann P, "'Law in Context" – Taking Context Seriously' [1995] 8 *Waikato Law Review* <[www.nzlii.org/nz/journals/WkoLRev/1995/index.html](http://www.nzlii.org/nz/journals/WkoLRev/1995/index.html)> accessed 17 November 2012
- Heftel CL, 'Corporate Governance in Japan: The Position of Shareholders in Publicly Held Corporations' (1983) 5 *University of Hawaii Law Review* 135
- Heywood D and Stronach I, 'Philosophy and hermeneutics' in Somekh B and Lewin C, *Research Methods in the Social Sciences* (Sage Publications 2005)
- High Pay Commission, 'Cheques with Balances: Why tackling high pay is in the national interest' <[www.highpaycentre.org/files/Cheques\\_with\\_Balances.pdf](http://www.highpaycentre.org/files/Cheques_with_Balances.pdf)> accessed 27 April 2014
- High Pay Commission, 'More for Less: what has happened to pay at the top and does it matter?' (May 2011) <[www.highpaycentre.org/img/High\\_Pay\\_Commission\\_More\\_for\\_Less.pdf](http://www.highpaycentre.org/img/High_Pay_Commission_More_for_Less.pdf)> 29 January 2014
- High Pay Commission, 'What are we paying for? Exploring executive pay and performance' <[www.mbsportal.bl.uk/secure/subjareas/accfinecon/highpaycommission/126842whatare wepayingfor11.pdf](http://www.mbsportal.bl.uk/secure/subjareas/accfinecon/highpaycommission/126842whatare wepayingfor11.pdf)> accessed 28 January 2013
- Hoecke VM (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing 2013)
- Hofheinz WW, 'Legal Analysis' (1997) <<http://www.hofheinz.com/LANLSYS.php>> accessed 12 October 2012
- Hoover's Inc., 'Hoover's IPO Analysis For 2001 Shows Resurgence of 'Not – Coms' <[www.hooverweb.hoovers.com/about/press-releases/100000407-1.html](http://www.hooverweb.hoovers.com/about/press-releases/100000407-1.html)> accessed 27 October 2013
- Hopt KJ, Kanda H, Roe MJ and Wymeersch E (eds.) *Comparative Corporate Governance*

(Oxford University Press 1998)

- House of Commons Treasury Committee, 'Banking Crisis: reforming corporate governance and pay in the City' (12 May 2009) <[www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/519/519.pdf](http://www.publications.parliament.uk/pa/cm200809/cmselect/cmtreasy/519/519.pdf)> accessed 14 November 2013

## I

- Ide RW, 'Post-Enron Corporate Governance Opportunities: Creating a Culture of Greater Board Collaboration and Oversight' (2003) 54 Mercer Law Review 829
- IMD World Competitiveness Center (WCC), 'World Competitiveness Yearbook 2000', 'World Competitiveness 2004' <[www.imd.org/wcc/wcy-world-competitiveness-yearbook-online/](http://www.imd.org/wcc/wcy-world-competitiveness-yearbook-online/)> accessed 7 October 2013
- IMD World Competitiveness Center (WCC), 'World Competitiveness Yearbook 2005' <[www.imd.org/wcc/wcy-world-competitiveness-yearbook-online/](http://www.imd.org/wcc/wcy-world-competitiveness-yearbook-online/)> accessed 7 October 2013
- Institute of Internal Auditors, 'Sarbanes-Oxley Section 404 Work: Looking at the Benefits' (2005) <[www.na.theiia.org/standards-guidance/leading-practices/Pages/Sarbanes-Oxley.aspx](http://www.na.theiia.org/standards-guidance/leading-practices/Pages/Sarbanes-Oxley.aspx)> accessed 19 March 2013
- International Labour Organization, 'World of Work 2008: Income Inequalities in the Age of Financial Globalization' (International Institute for Labour Studies, Geneva 2008) <[www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_099413.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_099413.pdf)> accessed 15 January 2014
- Itami H, *Japanese Style Corporate Governance* (Nihon Keizai Shimbunsha 2000)

## J

- Jaworski D, 'Kim pan jest, panie Kulczyk – sylwetka najbogatszego Polaka' *Gazeta.pl Wiadomości* (15 July 2011) <[www.wiadomosci.gazeta.pl/wiadomosci/1,114873,2162394.html](http://www.wiadomosci.gazeta.pl/wiadomosci/1,114873,2162394.html)> accessed 17 April 2014
- Jensen MC, 'The Modern Industrial Revolution, Exit and the Failure of Internal Control Systems' (1993) 48 Journal of Finance 831
- Jhering von R, *Geist des Römischen Rechts*, vol 1 (Breitkopf & Hartel 1955)

## K

- Kahn-Freund O, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review

- Kang JK and Shivdasani A, 'The Main Bank System and Corporate Monitoring and Control in Japan' (1989) 11 Journal of Economic Behaviour and Organization 399
- Kang JK and Shivdasani A, 'Firm Performance, Corporate Governance, and Top Executive Turnover in Japan' (1995) 11 Journal of Financial Economics 5
- Kaplan SN, 'Top Executive Rewards and Firm Performance: A Comparison of Japan and the United States' (1994) 102 Journal of Political Economy 29
- Kester WC, *Japanese Takeovers: The Global Contest for Corporate Control* (Harvard Business School Press 1991)
- Khoo BY, 'Review of Corporate Governance in Asia: Corporate Governance in Malaysia' (Asian Development Bank Institute 2003) <[www.adbi.org/conf-seminar-papers/2004/08/18/532.corporate.governance.malaysia/](http://www.adbi.org/conf-seminar-papers/2004/08/18/532.corporate.governance.malaysia/)> accessed 17 August 2013
- Kidyba A, *Kodeks Spółek Handlowych. Komentarz*, vol 1 (7th edn, Wolters Kluwer 2010)
- Kidyba A, *Kodeks Spółek Handlowych. Komentarz*, vol 2 (7th edn, Wolters Kluwer Polska 2010)
- King ME, 'Introduction and Background' in Institute of Directors in Southern Africa, 'King Report on Governance for South Africa 2009' <[www.iodsa.co.za/](http://www.iodsa.co.za/)> accessed 14 March 2013
- Kozarzewski P, 'Corporate Governance and Secondary Privatisation in Poland: Legal Framework and Changes in Ownership Structure' (Centre for Social and Economic Research, Studies & Analyses CASE No. 263, Warsaw 2003) <[www.case-research.eu/en/node/56038](http://www.case-research.eu/en/node/56038)> accessed 16 April 2014
- Kozarzewski P, 'Corporate Governance: Formation in Poland, Kyrgyzstan, Russia and Ukraine' (Centre for Social and Economic Research, Studies & Analyses CASE 347, Warsaw 2007) <[www.case.com.pl/upload/publikacja\\_plik/20444565\\_sa347.pdf](http://www.case.com.pl/upload/publikacja_plik/20444565_sa347.pdf)> accessed 3 July 2011
- Kozarzewski P, 'Privatization and Corporate Governance in Poland: Problems and Trends' (Centre for Social and Economic Research, Studies & Analyses No. 325, Warsaw 2007) <[www.case-research.eu/en/node/55442](http://www.case-research.eu/en/node/55442)> accessed 17 May 2014
- Kozarzewski P, 'Corporate Governance in State-controlled Enterprises in Poland' (2007) <[www.politologia.wsb-nlu.edu.pl/uploadedFiles/file/P%20Kozarzewski%20-%20CORPORATE%20GOVERNANCE%20IN%20STATE-CONTROLLED.pdf](http://www.politologia.wsb-nlu.edu.pl/uploadedFiles/file/P%20Kozarzewski%20-%20CORPORATE%20GOVERNANCE%20IN%20STATE-CONTROLLED.pdf)> accessed 10 July 2011
- Kozarzewski P and Woodward R, 'Secondary Privatization in Poland (Part I): Evolution of Ownership Structure and Company Performance in Firms Privatized by Employee Buyout' (Center for Social and Economic Research, Case Reports No. 47, Warsaw 2001) <[www.case-research.eu/upload/publikacja\\_plik/RC47.pdf](http://www.case-research.eu/upload/publikacja_plik/RC47.pdf)> accessed 29 March 2014
- KPMG, 'Financial Reporting Matters' (June 2014)

<[www.kpmg.com/sg/en/IssuesAndInsights/frm/Issue47-Jun2014.pdf](http://www.kpmg.com/sg/en/IssuesAndInsights/frm/Issue47-Jun2014.pdf)> accessed 28 June 2014

- KPMG Audit Committee Institute, 'Singapore's Corporate Governance, Transformed: The Strategy to Get it Right' (Singapore, 2011) <[www.kpmg.com/SG/en/IssuesAndInsights/CFOPublications/Documents/SingaporeCorporateGovernanceTransformed.pdf](http://www.kpmg.com/SG/en/IssuesAndInsights/CFOPublications/Documents/SingaporeCorporateGovernanceTransformed.pdf)> accessed 25 June 2014
- Kruczalak K (ed), *Kodeks Spółek Handlowych. Komentarz* (LexisNexis 2001)
- Kucharska E (ed) *Kodeks spółek handlowych. Code of commercial companies* (4th edn, Wolters Kluwer Polska 2011)

## L

- La Porta R, Lopes-de-Silanes F and Shleifer A, 'Corporate Governance Around the World' (1999) 54 (2) *The Journal of Finance* 471
- La Porta R, Lopes-de-Silanes F, Shleifer A and Vishny R, 'Law and Finance' (1998) 106 (6) *The Journal of Political Economy* 1113
- La Porta R, Lopez-de-Silanes F, Shleifer A and Vishny R, 'Investor Protection and Corporate Governance' (2000) 58 *Journal of Financial Economics*
- Lane C, 'Changes in Corporate Governance of German Corporations: Convergence to the Anglo-American Model?' (2003) 7 (2/3) *Competition & Change* 79
- Lane ND, *Techniques for Student Research: A Practical Guide* (2nd edn, Longman 1996)
- Legrand P, 'The Impossibility of Legal Transplants' [1997] *Maastricht Journal of European and Comparative Law* 111
- Leong HK (ed), *Reforming Corporate Governance in Southeast Asia: Economics, Politics and Regulations* (Institute of Southeast Asian Studies 2005)
- Letza S, Sun X and Kirkbride J, 'Shareholding versus Stakeholding: A Critical Review of Corporate Governance' (2004) 12 (3) *Corporate Governance: An International Review* 242
- Levin M, 'Continuities of Legal Consciousness: Professor John Haley's Writings On Twelve Hundred Years of Japanese Legal History' (2009) 8 *Washington University Global Studies Law Review* 317 <[www.ssrn.com/abstract=1551420](http://www.ssrn.com/abstract=1551420)> accessed 23 May 2014
- Ling TH, 'Disclosure vs Regulation: SGX Can Do with a Brazilian Model' *Business Times* (16 December 2004)
- Lipton M and Lorsch JW, 'A Modest Proposal for Improved Corporate Governance' (1992) 1 *Business Lawyer* 59
- Loderer C, Roth L, Waelchli U and Joerg P, 'Shareholder Value: Principles, Declarations, and Actions' (2010) *Financial Management* 5
- Lord & Benoit LLC, 'The Lord & Benoit Report: Do the Benefits of 404 Exceed the Cost?' (8



<[www.section404.org/pdf/Lord%20%20Benoit%20Report%20Do%20the%20Benefits%20of%20404%20Exceed%20the%20Cost.pdf](http://www.section404.org/pdf/Lord%20%20Benoit%20Report%20Do%20the%20Benefits%20of%20404%20Exceed%20the%20Cost.pdf)> accessed 29 September 2013

- Losz K, 'Historia Prywatyzacji Polskiego Przemysłu' *Nasz Dziennik* (15-16 września 2012)  
<[www.naszdziennik.pl/wp/9986,historia-prywatyzacji-polskiego-przemyslu.html](http://www.naszdziennik.pl/wp/9986,historia-prywatyzacji-polskiego-przemyslu.html)>  
accessed 17 April 2014
- Luoma P and Goodstein J, 'Stakeholders and corporate boards: Institutional influences on board composition and structure' (1999) 42 (5) *Academy of Management Journal* 553

## M

- MacNeil I and Li X, 'Comply or Explain: Market Discipline and Non-compliance with the Combined Code' (2006) 14 *Corporate Governance: An International Review* 486
- Mallin CA, *Corporate Governance* (4th edn, Oxford University Press 2013)
- Marens R and Wicks A, 'Getting Real: Stakeholder Theory, Managerial Practice, and the General Irrelevance of Fiduciary Duties Owed to Shareholders' (1999) 9 (2) *Business Ethics Quarterly* 273)
- Martin-Casals M, *The Development of Liability in Relation to Technological Change* (Cambridge University Press 2010)
- May T, *Social Research: Issues, Methods and Process* (4th edn, Open University Press 2011)
- McCormick N, *Legal Reasoning and Legal Theory* (Oxford University Press 1978)
- McGregor L, 'Improving Corporate Governance in South Africa. Discussion Paper Submitted for the 1<sup>st</sup> USB Colloquium on Corporate Governance 18<sup>th</sup> September 2008'  
<[www.governance.usb.ac.za/pdfs/UnitColloquiumPaper1\\_LynnMcGregor.pdf](http://www.governance.usb.ac.za/pdfs/UnitColloquiumPaper1_LynnMcGregor.pdf)> accessed 19 February 2013
- Merriam SB, *Case Study Research in Education: A Qualitative Approach* (Jossey-Bass 1988)
- Merryman JH and Pérez-Perdomo R, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007)
- Mertens DM, *Research Methods in Education and Psychology: Integrating Diversity with Quantitative and Qualitative Approaches* (Sage Publications 1998)
- Millstein IM and MacAvoy PW, 'The Active Board of Directors and Performance of the Large Publicly Traded Corporation' (1998) 98 *Columbia Law Review* 1283
- Millstein Center for Corporate Governance and Performance, 'Chairing the Board: The Case for Independent Leadership in Corporate North America' (2009)  
<[www.cii.org/UserFiles/file/Millstein%20Center%20Rpt%20-%20Chairing%20the%20Board%203-15-09.pdf](http://www.cii.org/UserFiles/file/Millstein%20Center%20Rpt%20-%20Chairing%20the%20Board%203-15-09.pdf)> accessed 19 December 2014
- Ministry of Treasury Republic of Poland, 'Statistics. Ownership Transformation' (18

February 2013) <[www.msp.gov.pl/en/privatisation/statistics/3967,Ownership-transformation.html](http://www.msp.gov.pl/en/privatisation/statistics/3967,Ownership-transformation.html)> accessed 25 May 2014

- Miyajima H, Aoki M and Jackson G, *Corporate Governance in Japan: Institutional Change and Organizational Diversity* (Oxford University Press 2008)
- Mizuno M and Tabner IT, 'Corporate Governance in Japan and the UK: Codes, Theory and Practice' (2009) 14 (5) *Pacific Economic Review* 622
- Molga T and Krawiec S, 'We are the Chinese of Europe' (*Voxeurop*, 23 October 2013) <[www.voxeurop.eu/en/content/article/4259621-we-are-chinese-europe](http://www.voxeurop.eu/en/content/article/4259621-we-are-chinese-europe)> accessed 24 March 2015
- Mondovisione World Exchange Intelligence, 'Bursa Malaysia Securities: Boards of Listed Companies to Be Responsible for Continuing Education of Directors' (30 September 2004) <[www.mondovisione.com/media-and-resources/news/bursa-malaysia-securities-boards-of-listed-companies-to-be-responsible-for-conti/](http://www.mondovisione.com/media-and-resources/news/bursa-malaysia-securities-boards-of-listed-companies-to-be-responsible-for-conti/)> accessed 28 August 2013
- Monetary Authority of Singapore, 'Developing the Disclosure-Based Regime for Singapore's Capital Markets. Annual Report, 2001-2002' <[www.mas.gov.sg/about-mas/reporting/~media/resource/about\\_us/annual\\_reports/annual0102/AnnualReport.a.shx](http://www.mas.gov.sg/about-mas/reporting/~media/resource/about_us/annual_reports/annual0102/AnnualReport.a.shx)> accessed 28 September 2013
- Morck RK and Steier L, 'The Global History of Corporate Governance: Introduction' (The National Bureau of Economic Research, November 2005) <[www.nber.org/papers/w11062](http://www.nber.org/papers/w11062)> accessed 5 June 2012
- Mura R, 'Firm Performance: Do Non-executive Directors Have Minds of Their Own? Evidence from UK Panel Data' (2007) 36 (3) *Financial Management* 81

## N

- Nakatani I, 'The Economic Role of Financial Corporate Grouping' in Aoki M, *The Economic Analysis of the Japanese Firm* (North-Holland 1984)
- Narioka K, 'Corporate-Governance Code Is Urged in Japan. Ruling-Party Proposal Would Be Aimed at Luring Foreign Investors' (*The Wall Street Journal*, 27 May 2014) <[www.online.wsj.com/news/articles/SB10001424052702304811904579587853072014222](http://www.online.wsj.com/news/articles/SB10001424052702304811904579587853072014222)> accessed 14 May 2014
- Naskręt M, 'Struktura akcjonariatu polskich banków' 590x (7 April 2013) <[www.590x.pl/2013/struktura-akcjonariatu-polskich-bankow/](http://www.590x.pl/2013/struktura-akcjonariatu-polskich-bankow/)> accessed 2 March 2014
- National Association of Corporate Directors, 'Key Agreed Principles to Strengthen Corporate Governance for US Publicly Traded Companies' (2008)
- New York Stock Exchange, 'Final New York Stock Exchange Corporate Governance Rules' (4

November 2003) <[www.nyse.com/pdfs/finalcorpgovrules.pdf](http://www.nyse.com/pdfs/finalcorpgovrules.pdf)> accessed 29 December 2014

- New York Stock Exchange, 'Report of the New York Stock Exchange Commission on Corporate Governance' (23 September 2010) <[www.nyse.com/pdfs/CCGReport.pdf](http://www.nyse.com/pdfs/CCGReport.pdf)> accessed 14 January 2014
- Nitta K, 'Cross Shareholdings and Business Management: An Empirical Analysis' (2000) 38 Security Analysts Journal 72

## O

- OECD, 'Guidelines for Multinational Companies' <[www.oecd.org/daf/inv/mne/](http://www.oecd.org/daf/inv/mne/)> accessed 5 August 2013
- OECD, 'OECD Principles of Corporate Governance' (2004) <[www.oecd.org/daf/ca/oecdprinciplesofcorporategovernance.htm](http://www.oecd.org/daf/ca/oecdprinciplesofcorporategovernance.htm)> accessed 28 May 2014
- Okolski J and Wajda D, 'Odpowiedzialność członków zarządu spółek kapitałowych' (2007) 2 Przegląd Prawa Handlowego 12
- Okolski J, Modrzejewski J and Gasiński Ł, 'Natura stosunku korporacyjnego spółki akcyjnej' (2000) 8 Przegląd Prawa Handlowego 11
- Okolski J, Modrzejewski J and Gasiński Ł, 'Zasada równego traktowania akcjonariuszy na gruncie k.s.h.' (2002) 10 Przegląd Prawa Handlowego 24
- Okolski J, Modrzejewski J and Gasiński Ł, 'Odpowiedzialność członków zarządu w spółkach kapitałowych – miernik staranności' in *Prawo Prywatne Czasu Przemian. Księga Pamiątkowa Dedykowana Profesorowi Stanisławowi Sołtysińskiemu* (Uniwersytet Adama Mickiewicza w Poznaniu 2005)
- Opalski A, 'Nowe Dobre Praktyki w spółkach publicznych' (2008) 3 Przegląd Prawa Handlowego 14
- Opalski A, 'O pojęciu interesu spółki kapitałowej' (2008) 11 Przegląd Prawa Handlowego 16
- Opalski A, *Rada Nadzorcza w Spółce Akcyjnej* (C.H. Beck 2006)
- Oplustil K and Radwan A, 'Company Law in Poland: Between Autonomous Development and Legal Transplants' in Jessel-Holst C, Kulms R and Trunk A (eds), *Private Law in Eastern Europe: Autonomous Development or Legal Transplants?* (Mohr Siebeck 2011)
- O'Reilly J, 'Theoretical Considerations in Cross-national Employment Research' (1996) 1 (1) Sociological Research Online <<http://www.socresonline.org.uk/1/1/2.html>> accessed 20 November 2012

## P

- PAP, 'Jan Kulczyk świadkiem w sprawie PKN Orlen' (*WP.PL wiadomości*, 10 August 2004) <[www.wiadomosci.wp.pl/kat,1342,title,Jan-Kulczyk-swiadkiem-w-sprawie-PKN-Orlen,wid,5570794,wiadomosc.html](http://www.wiadomosci.wp.pl/kat,1342,title,Jan-Kulczyk-swiadkiem-w-sprawie-PKN-Orlen,wid,5570794,wiadomosc.html)> accessed 18 March 2014
- PAP, 'Kulczyk pozbywa się akcji Orlenu' *Wprost* (29 October 2004) <[www.wprost.pl/ar/69658/Kulczyk-pozbywa-sie-akcji-Orlenu/](http://www.wprost.pl/ar/69658/Kulczyk-pozbywa-sie-akcji-Orlenu/)> accessed 27 March 2014
- Paul R, 'Repeal Sarbanes-Oxley!' (Reason to Freedom, 14 April 2005) <[www.reasontofreedom.com/repeal\\_sarbanes\\_oxley\\_by\\_us\\_rep\\_ron\\_paul.html](http://www.reasontofreedom.com/repeal_sarbanes_oxley_by_us_rep_ron_paul.html)> accessed 15 October 2013
- Phillips R, *Stakeholder Theory and Organizational Ethics* (Berrett-Koehler Publishers 2003) 119
- Piotroski JD and Srinivasan S, 'Regulating and Bonding: The Sarbanes-Oxley Act and the Flow of International Listings' (2008) 46 (2) *Journal of Accounting Research* 383
- Poznanski KZ, 'Privatisation of the Polish Economy: Problems of Transition' (1992) 44 (4) *Soviet Studies* <<http://www.jstor.org/stable/152201>> accessed 2 July 2011
- Pratt JW and Zeckhauser RJ (eds), *Principals and Agents: The Structure of Business* (Harvard Business School Press 1985)
- PricewaterhouseCoopers Southern Africa, 'King's Counsel. Understanding and Unlocking the Benefits of Sound Corporate Governance' (September 2009) <[www.cymcdn.com/sites/www.iodsa.co.za/resource/collection/dd8b591e-3d00-48d5-b2e9-663fedcff131/Executive\\_guide\\_to\\_King\\_III.pdf?hhSearchTerms=%22King+and+III+and+Co+unsel+and+Guide%22](http://www.cymcdn.com/sites/www.iodsa.co.za/resource/collection/dd8b591e-3d00-48d5-b2e9-663fedcff131/Executive_guide_to_King_III.pdf?hhSearchTerms=%22King+and+III+and+Co+unsel+and+Guide%22)> accessed 23 May 2014
- PricewaterhouseCoopers Poland, 'Komitety audytu w Polsce w roku 2011. Badanie spółek publicznych notowanych na GPW' <[www.forumradnadzorczych.pl/en/czytaj/155/raport](http://www.forumradnadzorczych.pl/en/czytaj/155/raport)> accessed 15 May 2014
- PricewaterhouseCoopers, 'Rady nadzorcze 2013. Skuteczność rad nadzorczych w spółkach publicznych notowanych na GPW' (2012) <[www.pwc.pl/pl\\_PL/pl/publikacje/pwc\\_rady\\_nadzorcze\\_2013.pdf](http://www.pwc.pl/pl_PL/pl/publikacje/pwc_rady_nadzorcze_2013.pdf)> accessed 26 May 2014
- PricewaterhouseCoopers Poland, 'Wynagrodzenie prezesów według PwC' <<http://www.pwc.pl/pl/biuro-prasowe/wynagrodzenia-prezesow-wedlug-pwc.jhtml>> accessed 2 May 2014
- PricewaterhouseCoopers Poland, 'Wynagrodzenia zarządów największych spółek giełdowych w 2012 roku: czy giełda popłaca?' (Warsaw, 24 June 2012) <[www.pwc.pl/pl/biuro-prasowe/assets/pwc\\_prezentacja\\_wynagrodzenia\\_czlonkow\\_zarzadu.pdf](http://www.pwc.pl/pl/biuro-prasowe/assets/pwc_prezentacja_wynagrodzenia_czlonkow_zarzadu.pdf)> accessed 24

May 2014

- PricewaterhouseCoopers Poland, 'Zmiany w funkcjonowaniu rad nadzorczych zmierzają w dobrym kierunku lecz wymagają przyśpieszenia' <[www.pwc.pl/pl/biuro-prasowe/2014/2014-03-20-zmiany-w-funkcjonowaniu-rad-nadzorczych-zmierzaja-w-dobrym-kierunku-lecz wymagaja-przyspieszenia.jhtml](http://www.pwc.pl/pl/biuro-prasowe/2014/2014-03-20-zmiany-w-funkcjonowaniu-rad-nadzorczych-zmierzaja-w-dobrym-kierunku-lecz-wymagaja-przyspieszenia.jhtml)> accessed 16 May 2014
- PRNewswire A UBMplccompany, 'Number of IPOs in 2004 Increased by 195%; IPO Activity in Q4 2004 Strongest in More Than Four Years' <[www.prnewswire.com/news-releases/number-of-ipos-in-2004-Strongest-in-more-than-years-53844047.html](http://www.prnewswire.com/news-releases/number-of-ipos-in-2004-Strongest-in-more-than-years-53844047.html)> accessed 17 September 2013

## R

- Radwan A, *Prawo poboru w spółce akcyjnej* (C.H. Beck 2004)
- Radwan A, '25 Thoughts on European Company Law in the EU of 25' (2006) 4 European Business Law Review 1171
- Radwan A, 'Non ex regula ius sumatur or about a few endangered truths' (2007) 3 Quarterly for the Entire Commercial, Insolvency and Capital Market Law 6
- Rapoport NB, Niel JDV and Dharan BG, *Enron and Other Corporate Fiascos: The Corporate Scandal Reader* (2nd edn, Foundation Press 2009)
- Reed D, 'Corporate Governance in Developing Countries' (2002) 37 Journal of Business Ethics 223
- Reichertz J, 'Abduction: The Logic of Discovery of Grounded Theory' in Bryant A and Charmaz K (eds), *The Sage Handbook of Grounded Theory* (Sage Publications 2007)
- Rhodes M and Apeldoorn van EB, 'Capital Unbound? The Transformation of European Corporate Governance' (1998) 5 (3) Journal of European Public Policy 406
- Robson C, *How to Do a Research Project: A Guide for Undergraduate Project* (Blackwell Publishing 2007)
- Rodrigues U, 'The Fetishization of Independence' (2008) 33 (1) Journal of Corporate Law 447
- Roman RM, Hayibor S and Agle BR, 'The Relationship Between Social and Financial Performance' (1999) 38 (1) Business & Society 109
- Rondinelli DA and Yurkiewicz J, 'Privatisation and Economic Restructuring in Poland: An Assessment of Transitional Policies' (1996) 55 (2) The American Journal of Economics and Sociology <[www.jstor.org/stable/3487075](http://www.jstor.org/stable/3487075)> accessed 12 July 2011
- Stuart Rosenstein and Jeffrey G. Wyatt, 'Outside Directors, Board Independence and Shareholder Wealth' (1990) 26 Journal of Financial Economics 175
- Rossman GB and Wilson BL, 'Numbers and Words: Combining Quantitative and Qualitative

## S

- Salter M and Mason J, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Longman Pub Group 2007)
- Sanders WG and Carpenter MA, 'Internationalization and Firm Governance: The Roles of CEO Compensation, Top Team Composition, and Board Structure' (1998) 41 *Academic Management Journal* 158
- Saunders M, Lewis P and Thornhill A, *Research Methods for Business Students* (Financial Times Prentice Hall 2012)
- Schlesinger RB, 'Research on the General Principles of Law Recognised by Civilised Nations' (1957) 51 *American Journal of International Law* 734
- Schlesinger RB, 'The Common Core of Legal Systems: An Emerging Subject of Comparative Study' in Nadelmann KH, Mehren von AT and Hazard JN (eds), *XXth Century Comparative and Conflicts Law, Legal Essays in Honour of Hessel E. Yntema* (AW Sythoff 1961)
- Schmidthoff CM, 'The Science of Comparative Law' (1939) 7 *Cambridge Law Journal* 94
- Schwab K (ed), 'The Global Competitiveness Report 2013-2014' (World Economic Forum 2013) <[www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2013-14.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf)> accessed 16 August 2014
- Securities and Exchange Commission, 'Final New York Stock Exchange Corporate Governance Rules' (4 November 2003) <[www.nyse.com/pdfs/finalcorpgovrules.pdf](http://www.nyse.com/pdfs/finalcorpgovrules.pdf)> accessed 29 December 2014
- Securities and Exchange Commission, 'Final of the Advisory Committee on Smaller Public Companies' (23 April 2006) <[www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf](http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf)> accessed 13 January 2014
- Seidl D, Sanderson P and Roberts J, 'Applying 'Comply-or-Explain': Conformance with Codes of Corporate Governance in the UK and Germany', Centre for Business Research, University of Cambridge, Working Paper No. 389, 2009 <[www.cbr.cam.ac.uk/pdf/WP389.pdf](http://www.cbr.cam.ac.uk/pdf/WP389.pdf)> accessed 23 June 2013
- Seidman A and RB, *State and Law in the Developing Process: Problem Solving and Institutional Change in the Developing World* (Macmillan Publishers 1994)
- Sheard P, Kaplan SN and Minton BA, 'Appointments of Outsiders to Japanese Boards: Determinants and Implications for Managers' 36 (1994) *Journal of Financial Economics* 510
- Shleifer A and Vishny RW, 'Large Shareholders and Corporate Control' (1986) 94 *Journal of Political Economy* 461
- Skaife HA, Collins DW, Kinney WR and LaFond R, 'The Effect of SOX Internal Control

Deficiencies on Firm Risk and Cost of Equity' (10 June 2008)  
[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=896760](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896760) accessed 18 March 2013

- Słomka-Gołębiowska A, 'Czy banki wypełniają lukę w ładzie korporacyjnym w Polsce' (2007) 1 Quarterly for the Entire Commercial, Insolvency and Capital Market Law
- Solska J, 'Spór o spółki Skarbu Państwa. Spółka ze stołkami' *Polityka* (Warsaw, 10 February 2011) [www.polityka.pl/rynek/gospodarka/1512740,1,spor-o-spolki-skarbu-panstwa.read](http://www.polityka.pl/rynek/gospodarka/1512740,1,spor-o-spolki-skarbu-panstwa.read) accessed 15 September 2011
- Sołtysiński S, 'Reform of Polish Company Law' in Grossfeld B, *Festschrift für Wolfgang Fikentscher zum 70. Geburtstag* (Mohr Siebeck 1998)
- Sołtysiński S, 'Transfer of Legal Systems as Seen by the "Import Countries": A View from Warsaw' in Drobnig U, Hopt KJ, Kötz H and Mestmäcker EJ (eds), *Systemtransformation in Mittel- und Osteuropa und ihre Folgen für Banken, Börsen und Kreditsicherheiten* (Mohr Siebeck 1998)
- Sołtysiński S, 'Sources of Foreign Inspiration in the Draft of the Polish Company Law' in Baums T, Hopt KJ and Horn N (eds), *Corporations, Capital Markets and Business in the Law* (Kluwer Law International 2000)
- Stake RE, *The Art of Case Study Research* (Sage Publications 1995)
- Stevenson RW, 'Balancing the Power at the Corporate Top, British Style', *New York Times* (15 November 1992)
- Stroiński RT, 'Takeovers in Poland – Current Regulations and Towards Implementation of the Takeover Directive' (2000) 16 (6) *European Business Law Review* 1443

## T

- Tan WL and Tan TM, 'The Impact of Corporate Governance on Value Creation in Entrepreneurial Firms' (Singapore Management University, undated) [works.bepress.com/weeliang\\_tan/7](http://works.bepress.com/weeliang_tan/7) accessed 29 September 2012
- Tarnowski P, 'Lista 500 po 20 latach' *Polityka.pl* (14 May 2013) [www.lista500.polityka.pl/articles/show/55](http://www.lista500.polityka.pl/articles/show/55) accessed 15 March 2014
- Temkin S, 'King Calls for More Transparency' (Mervyn E King SC, 2 September 2009) [www.mervynking.co.za/news/archives/09\\_09\\_king3\\_bd.htm](http://www.mervynking.co.za/news/archives/09_09_king3_bd.htm) accessed 17 July 2013
- Terterov M and Reuvid J (eds), *Doing Business with Poland* (4th edn, GMB Publishing Ltd 2005)
- Teubner G, 'Legal Irritants: Good Faith in British Law or How Unifying Law Wends Up in New Divergences' (1998) 61 *Modern Law Review* 11
- The Free Dictionary by Farlex [www.thefreedictionary.com/case](http://www.thefreedictionary.com/case) accessed 15 March 2014
- Thyil V and Young S, 'An Empirical Investigation of Hybrid Corporate Governance Systems

in Large Firms: Evidence from India' (2011) 8 (1) Corporate Ownership & Control 430

- Tittenbrum J, *Z Deszczu pod Rynnę. Meandry Polskiej Prywatyzacji*, vol 1-4 (Zysk I S-KA 2007)
- Tonello M, 'Separation of Chair and CEO Roles' (The Harvard Law School Forum. Corporate Governance and Finance, 2011) <[www.blogs.law.harvard.edu/corpgov/2011/09/01/separation-of-chair-and-ceo-roles/](http://www.blogs.law.harvard.edu/corpgov/2011/09/01/separation-of-chair-and-ceo-roles/)> accessed 18 January 2014
- Trumble WR (ed), *Shorter Oxford Dictionary* (6th edn, Oxford University Press 2007)
- Tullberg J, 'Stakeholder theory: Some revisionist suggestions' (2013) 42 The Journal of Socio-Economics 127
- Turek A, 'Siemoniak: „Polska jest jednym z najlepszych miejsc do inwestowania”. Ale naszą przewagą wciąż jest tania siła robocza' (*Inn Poland*, January 2015) <[innpoland.pl/114329,siemoniak-polska-jest-jednym-z-najlepszych-miejsc-do-inwestowania-jest-sie-z-czego-cieszy](http://innpoland.pl/114329,siemoniak-polska-jest-jednym-z-najlepszych-miejsc-do-inwestowania-jest-sie-z-czego-cieszy)> accessed 25 March 2015

## U

- United Nations, 'Global Compact and the Principles for Responsible Investment' <[www.unpri.org/introducing-responsible-investment/](http://www.unpri.org/introducing-responsible-investment/)> accessed 21 July 2013

## V

- Verschoor CC and Murphy EA, 'The Financial Performance of Large U.S. Firms and Those with Global Prominence: How Do the Best Corporate Citizens Rate?' (2002) 107 (3) Business and Society Review 371
- Vo T-NT, 'Rating Management Behavior and Ethics: A Proposal to Upgrade the Corporate Governance Rating Criteria' (2008) 34 Journal of Corporate Law 1
- Vo T-NT, 'To Be or Not to Be Both CEO and Board Chair' (2010) 76 Brooklyn Law Review (2010) 65

## W

- Waddock SA and Graves SB, 'The Corporate Social Performance – Financial Performance Link' (1997) 18 (4) Strategic Management Journal 303
- Wang J, 'Sarbanes-Oxley Section 404 Places Disproportionate Burden on Smaller Public Companies' (Centre for Data Analysis, August 2008) <[www.web.archive.org/web/20081024140435/http://www.heritage.org/CDA/upload/SOX-CDA-edited-3.pdf](http://www.web.archive.org/web/20081024140435/http://www.heritage.org/CDA/upload/SOX-CDA-edited-3.pdf)> accessed 23 November 2013
- Watson A, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974)



- Watson A, 'Legal Transplants and Law Reform' (1976) 92 Law Quarterly Review 79
- Watson A, 'Legal Transplants and European Private Law' in *Ius Commune Lectures on European Private Law*, no 2 (Unigraphic 2000)
- Weir C, Talavera O and Muravyer A, 'The Return on Human Capital: The Case of UK Non-Executive Directors that are also Executive Directors' <[www.uea.ac.uk/documents/953219/967353/UEA-AFE-029.pdf/013212d5-d252-4d1a-868c-12ec67764092](http://www.uea.ac.uk/documents/953219/967353/UEA-AFE-029.pdf/013212d5-d252-4d1a-868c-12ec67764092)> accessed 17 March 2014
- West A, 'Theorising South Africa's Corporate Governance' (2006) 63 (4) Journal of Business Ethics 433
- Wieland J, 'Corporate Governance, Values Management, and Standards: A European Perspective' (2005) 44 (1) Business and Society 74
- Witzel M, *Builders & Dreamers. The Making and Meaning of Management* (Pearson Education Limited 2002)

## X

- Xanthaki H, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 (3) International and Comparative Law Quarterly 659

## Y

- Yafe Y, 'Corporate Governance in Japan: Past Performance and Future Prospects' (2000) 16 (2) Oxford Review of Economic Policy 74
- Yeh Y-H, Chung H and Liu C-L, 'Committee Independence and Financial Institution Performance during the 2007-08 Credit Crunch: Evidence from a Multi-Country Study' (2011) 19 (5) Corporate Governance: An International Review 437
- Yermack DL, 'Higher Market Valuation of Companies with a Small Board of Directors' (1996) 40 Journal of Financial Economics 185
- Yin RK, *Case Study Research: Design and Method* (3rd edn, Sage Publications 2003)
- Yoshikawa T, 'Changing Characteristics of Corporate Governance in Japan: Influences of Globalization' (1995) 4 Business & the Contemporary World 15
- Yoshikawa T and Linton J, 'The Applicability of North American Corporate Governance and Investor Relations Practice to Japanese Firms: Theoretical Support and Preliminary Investigation' (2000) 16 Journal of Asian Business
- Yoshikawa T and Phan PH, 'Alternative Corporate Governance Systems in Japanese Firms: Implications for A Shift to Stockholder-Centered Corporate Governance' (2001) 18 Asia Pacific Journal of Management 183
- Yoshikawa T and Phan PH, 'The Performance Implications of Ownership-Driven Governance

## Z

- Zhaung S, 'Legal Transplantation in the People's Republic of China: A Response to Alan Watson' [2006] European Journal of Law Reform 215
- Ziemiński Z, *Logika Praktyczna* (Wydawnictwo Naukowe PWN 2004)
- Zweigert K and Kötz H, *Einführung in die Rechtsvergleichung*, 3. neubearbeitete Auflage (JCB Mohr 1996)
- Zweigert K and Siehr K, 'Jhering's Influence on the Development of Comparative Legal Method' (1971) 19 American Journal of Comparative Law 215

# APPENDICES

## Appendix 1

**Table1.** Shareholders and creditor rights<sup>1026</sup>:

Categorical Means for Legal Families <sup>a</sup>			
Category	Observations <sup>a</sup>	Shareholder rights	Creditor rights
English	18/19	4.00 (0.970)	3.11 (1.231)
French	21/19	2.33 (1.197)	1.58 (1.346)
German	6/6	2.33 (1.033)	2.33 (.816)
Scandinavian	4/4	3.00 (.816)	2.00 (.816)
Sample Average	49/47	3.00 (1.307)	2.30 (1.366)

Differences in Means <sup>b</sup>		
English – French	1.67 (.000)*	1.53 (.001)*
English – German	1.67 (.008)*	.78 .101***
English – Scandinavian	1.00 (.085)***	1.11 (.065)***
French – German	0.00 (1.000)	–.75 (.119)
French – Scandinavian	–.67 (.220)	–.42 (.438)
German – Scandinavian	–.67 (.291)	.33 (.548)

<sup>a</sup> Standard deviations are in parentheses. <sup>b</sup> A two-sided two-sample t test with unequal variances is performed. P-values are reported in parentheses. \* Significant at the 1-percent level; \*\*

<sup>1026</sup> Berkowitz, Pistor & Richard (n 223).

significant at the 5-percent level; \*\*\* significant at the 10 percent level.

Berkowitz, Pistor and Richard<sup>1027</sup> describe this table as follows:

‘Shareholder rights and creditor rights are cumulative indices (...) that measure the scope of the protection of shareholder and creditor rights by statutory law. The categorical means on the top half of (...) [the table] show that the English have strongest and the French have the weakest protection of shareholder and creditor rights, while the German and Scandinavian families are in the middle. The bottom half of (...) [the table] tabulates differences in means for shareholder and creditor rights for the six different pairs of legal families. The parenthesis in each cell contain p-values, which measure the probability of falsely rejecting the null hypothesis that the difference in means across a pair of legal families is negligible. Following standard statistical practice, we do not reject the null hypothesis when the p-value exceeds .10. The p-values show that the difference in means across the English family and the three civil law families are statistically significant (...). Thus, the legal families are a useful indicator for the quality of the law on the books in the different countries in our sample.’

## **Appendix 2**

### **Examples of company explanations on compliance with the UK Corporate Governance Code**

Example of an explanation that is considered to be satisfactory:

‘In determining its overall policy in respect of service contracts, the Committee aims to balance the costs associated with any early termination provisions with the need to protect GlaxoSmithKline’s intellectual property rights. The Committee maintains a close watch, through its advisors, on trends in contractual terms amongst other companies in the competitor panel and in the wider market place. It is committed to ensuring that, in achieving this balance, its processes are fair, while limiting as far as possible the scope for ‘rewarding failure’. The Committee has considered the recent guidance produced by the Association of British Insurers and the National Association of Pension Funds in the UK. It will take this into account, alongside market practice, when reviewing contractual terms.

Executive Directors are employed on service contracts under which the employing company is

---

<sup>1027</sup> Berkowitz, Pistor & Richard (n 223).

required to give 24 calendar months' notice of termination and the Executive Directors are required to give 12 calendar months' notice.

Executive Directors' service contracts contain 'garden leave', non-competition, non-solicitation and confidentiality clauses.

The Remuneration Committee currently believes that one year contracts would not be in the best interest of GlaxoSmithKline with regard to offering a globally competitive overall remuneration package and securing maximum protection for its intellectual property rights.

The Remuneration Committee believes that the current termination payments due under Executive Director's contracts are justified because they represent fair and reasonable compensation in the event that the contracts are terminated, given market practice and the associated restrictions arising from the need to protect intellectual property (from the 2002 Annual Report of GlaxoSmithKline).<sup>1028</sup>

Example of an explanation that is considered to be unsatisfactory (it does not identify special circumstances):

'The Board has not identified a senior independent non-executive director, as specified by the Code, because it considers such an appointment to be unnecessary at present (from the 1999 Annual Report of Reuters).<sup>1029</sup>

---

<sup>1028</sup> Arcot, Bruno & Faure-Grimaud (n 31).

<sup>1029</sup> *ibid.*

## Appendix 3

**Table 2.** Main forms of doing business in Poland<sup>1030</sup>

Form of business/main act regulating	Requirements to establish	Members	Governance	Legal personality	Liability
<b>Joint-stock company</b>  <b>The Company Code of 2000; The Act on Commercialisation and Privatisation of State-Owned Enterprises of 1996</b>	Adopting the statute of the company in the form of a notarial deed; a subscription of all shares in the company by the shareholders; making contribution by the shareholders – the nominal share capital is PLN 100,000 – divided into shares of equal nominal value; the appointment of corporate governance; the entry of the company in the National Court Register (KRS).	Shareholders – natural or legal persons, or organisational units without legal personality to which the applicable laws have granted legal personality	Management board; obligatory supervisory board, the general meeting of shareholders	It has legal personality.	<p>The company bears unlimited liability for its obligations up to the full value of all of its assets.</p> <p>The shareholders are not liable for the obligations of the company. The shareholders' risk arising from the participation in the company is limited to the capital invested in the subscription or purchase of shares.</p>
<b>Limited liability company</b>  <b>The Company Code of 2000; The Act on Commercialisation and Privatisation of State-Owned Enterprises of 1996</b>	Adopting the articles of association in the form of a notarial deed; the contributions by shareholders of the entire share capital - the minimum share capital is PLN 5,000, and the share premium (difference between the price at which the shares are acquired and their nominal value); the appointment of a management board; the appointment of a supervisory board or auditors' committee; registration in the entrepreneurs' register of the National Court Register (KRS).	Shareholders – natural or legal persons, or organisational units without legal personality to which the applicable laws have granted legal personality	Management board; supervisory board and/or auditors' committee – obligatory only when all of the following circumstances occur jointly: a) share capital exceeds PLN 500,000, b) number of shareholders exceeds 25; shareholders' meeting.	As above	<p>The company is liable for its debts and obligations with its whole property without any limitations.</p> <p>Shareholders do not bear any liability for the company's obligation. Their risk is limited to funds involved in the company by virtue of contributions or additional payments.</p>
<b>General partnership</b>  <b>The Company Code of 2000</b>	The partners conclude articles of association (in person or through authorised representatives). The registry court enters the partnership in the	At least two founders from among: natural persons, legal persons, and organisational units without legal personality	Each partner may represent the partnership individually unless the articles of association set forth different	It has no legal personality, but it has: a) legal capacity – may acquire rights and incur obligations on its own behalf; b)	The partnership bears unlimited liability for its obligations up to the full value of all of its assets.

<sup>1030</sup> Based on the Company Code of 2000. For further information on business forms in Poland go to <[www.paiz.gov.pl/polish\\_law/forms\\_of\\_doing\\_business](http://www.paiz.gov.pl/polish_law/forms_of_doing_business)> accessed 17 March 2014.

	National Court Register – as of this moment the partnership is established. There is no minimum capital requirement.	to which the applicable laws have granted legal capacity. A general partnership may be established by and between different types of entities, eg a natural person and a legal person.	rules for representing the partnership.	judicial capacity – may be a party to court proceedings; and procedural capacity – may appear before a court independently to defend its interests.	
<b>Professional partnership</b>  <b>The Company Code of 2000</b>	As above	At least two natural persons who have the right to practise freelance professions specified in the legal provisions.  The partners of a limited liability partnership are called 'partnerzy'.	Each partner may represent the partnership individually unless the articles of association set forth different rules for representing the partnership.  Articles of association may provide that the conduct of the affairs and representation of the partnership shall be exclusively entrusted to the management board, to which provisions on the management board in the limited liability company shall accordingly apply.	As above	The partnership bears unlimited liability for its obligations up to the full value of all of its assets.  A partner does not bear liability for the partnership's obligations arising from the practice of freelance professions by the remaining partners of the partnership, nor for actions and defaults of employees, employed by the partnership under an employment contract or on the basis of a different legal relationship, who worked under supervision of the other partners at the time of providing a service related to the partnership's business.
<b>Limited partnership</b>  <b>The Company Code of 2000</b>	As above	At least two founders from among: a) natural persons, b) legal persons, c) organisational units without legal personality to which the applicable laws have granted legal capacity.  A limited partnership may be established by and between different types of entities, eg	The partnership's affairs cannot be entrusted solely to parties other than the partners.  The right and obligation to conduct the partnership's affairs: a) each general partner, b) limited partners have neither right nor obligation to conduct the partnership's affairs, unless the articles of	As above	The partnership bears unlimited liability for its obligations up to the full value of all of its assets.  The scope of the partner's liability: a) in case of a general partner – with all his assets, b) in case of a limited partner – up to the amount of limited liability amount, whereas he is free from the liability within the contribution made to the partnership.

		<p>a natural person and a legal person.</p> <p>There are two types of partners:</p> <p>a) general partners bearing unlimited liability (at least one),</p> <p>b) limited partners (at least one) liable to the amount specified in the articles of association.</p>	<p>association provide otherwise.</p> <p>Conduct of the partnership's affairs may be entrusted to one or more partners (to the exclusion of others).</p>		
<p><b>Limited joint-stock partnership</b></p> <p><b>The Company Code of 2000</b></p>	<p>Adopting the statute of the partnership in the form of a notarial deed; subscription of all shares by the shareholders; making contributions by the shareholders – the minimum share capital is PLN 50,000; the appointment of a supervisory board – obligatory only if the total number of shareholders exceeds 25; the entry of the partnership in the register of entrepreneurs of the National Court Register (KRS).</p>	<p>General partner – one or more entities from among:</p> <p>a) natural persons,</p> <p>b) legal persons,</p> <p>c) organisational units without legal personality to which the applicable laws have granted legal capacity.</p> <p>Shareholder – one or more entities from among:</p> <p>a) natural persons,</p> <p>b) legal persons,</p> <p>c) organizational units without legal personality to which the applicable laws have granted legal capacity.</p>	<p>Running the partnership' affairs rests with general partners, with the exception of matters falling within the competence of the general meeting for shareholders or the supervisory board, pursuant to the provisions of the Commercial Partnerships and Companies Code or the statute.</p> <p>The shareholders do not have the right to run the partnership's affairs.</p> <p>No individual supervision right of a shareholder over the partnership.</p> <p>The creation of a supervisory board is obligatory, if there are more than 25 shareholders.</p>	As above	<p>The partnership bears unlimited liability for its obligations up to the full value of all of its assets.</p> <p>The general partners bear unlimited liability for partnership's obligations up to the full value of all of their assets, jointly and severally with the partnership.</p> <p>The shareholders' risk arising from the participation in the partnership is limited to the capital invested in the subscription or purchase of shares.</p>
<p><b>Sole entrepreneurship</b></p> <p><b>The Act on Freedom of Economic Activity of 2004</b></p>	<p>Filing an application to the Central Business Activity Record and Information (CEIDG).</p> <p>Entrepreneur may commence business activity after filing an</p>	<p>Entrepreneur conducting individual business activity acts on his own behalf. He may appoint a proxy to conduct his affairs.</p>	<p>The entrepreneur on his/her behalf</p>	<p>Natural person conducting a business activity has:</p> <p>a) legal capacity,</p> <p>b) capacity to undertake legal actions,</p> <p>c) judicial capacity (capacity</p>	<p>Full liability with all personal assets</p>



	application for registration.			to be a party in court proceedings and capacity to conduct court proceeding).	
<b>Civil partnership</b>  <b>The Civil Law Code of 1964</b>	<p>Concluding the civil law partnership agreement in a written form; submitting the agreement to:</p> <p>a) a competent tax office and</p> <p>b) the Central Statistical Office; filing of an update application to the CEIDG (with regard to the assigned NIP (tax) and REGON (statistical) numbers).</p>	<p>At least two founders from among:</p> <p>a) natural persons,</p> <p>b) legal persons,</p> <p>c) organisational units without legal personality to which the applicable laws have granted legal capacity.</p> <p>Partners are entrepreneurs within the scope of business activity conducted in civil law partnership.</p>	<p>The right and obligation of each partner to conduct the partnership's affairs.</p> <p>Scope of authorisation to run the partnership's affairs:</p> <p>a) day-to-day actions of partnership,</p> <p>b) every urgent action, which, if omitted, could result in a serious damage for the partnership (regardless of its scope, even without a prior resolution of partners).</p> <p>Before an individual partner handles a matter falling within the scope of day-to-day management, any of the remaining partners may oppose its handling. In such cases, a prior resolution of the partners is required.</p>	<p>Civil law partnership is not a separate legal entity. Only its partners are such entities.</p> <p>However, civil law partnership is subject to VAT and excise tax as if it were a separate entity.</p>	<p>Joint and several liability of all partners for obligations arising within the partnership.</p> <p>Liability covers assets in joint co-ownership between partners, as well as personal assets of each partner.</p>
<b>Branch</b>  <b>The Act on Freedom of Economic Activity of 2004</b>	<p>Foreign entrepreneur's application to KRS.</p> <p>The branch may commence activity after having been entered into the entrepreneurs' register.</p>	Foreign entrepreneur	Foreign entrepreneur appoints a person authorised to his/her representation.	<p>The branch is not an entity separate from the foreign entrepreneur and does not have:</p> <p>a) legal personality,</p> <p>b) legal capacity,</p> <p>c) judicial capacity (capacity to be a party in court proceedings and capacity to conduct court proceedings in defence of its interests).</p>	Full liability of a foreign entrepreneur

				Foreign entrepreneur, represented in a branch by an authorised person, has all of the aforesaid capacities.	
<b>Agency</b>  <b>The Act on Freedom of Economic Activity of 2004</b>	Foreign entrepreneur's application to the Register of Foreign Entrepreneurs' Agencies kept by the Minister of Economy.  Agency may commence activity after having been entered into the Register of Foreign Entrepreneurs' Agencies.	As above	As above	As above	As above

## Appendix 4

**Table 3.** Summary of main categories of share ownership in the UK 1963-2010<sup>1031</sup>

Type of investor	1963	2010
	%	%
<b>Individuals</b>	54	11.5
<b>Insurance companies</b>	10	8.6
<b>Pension funds</b>	6	5.1
<b>Unit trusts</b>	1	6.7
<b>Other financial institutions</b>	11.3	16.0
<b>Overseas</b>	7	41.2

Source: Ownership of UK Quoted Shares 2010 (Office for National Statistics (ONS), 2012)

(Other categories owning shares include banks, investment trusts, public sector, private non-financial companies, and charities)

<sup>1031</sup> Mallin (n 27) 105.

## Appendix 5

**Table 4.** Shareholder structure of five largest Polish companies<sup>1032</sup>

Corporation*	Shareholders – % of shares*
PKN Orlen SA	The State Treasury – 27.52%, Aviva OFE** – 7.01%, ING OFE – 9.35%, the others – 56.11%
GK Grupy Lotos SA	The State Treasury – 53.19%, ING OFE – 5.31%, the others – 41.50%
Polska Grupa Energetyczna SA	The State Treasury – 61.89%, the others – 38.11%
Jeronimo Martins Polska SA	n/a***
GK PGNiG SA	The State Treasury – 72.40%, the others – 27.60%
GK Tauron Polska Energia SA	The State Treasury – 30.06%, KGHM Polska Miedź SA – 10.39%, ING OFE – 5.06%, the others – 54.49%

\* Status as at 1 May 2014.

\*\* OFE (otwarty fundusz emerytalny) – an open pension fund.

\*\*\* not available

**Table 5.** Shareholder structure of banks in Poland<sup>1033</sup>

Bank*	Shareholders (Country) – % of shares*
PKO Bank Polski	The State Treasury (Poland) – 31.39%; Aviva OFE** (Poland) – 6.72%, ING OFE (Poland) – 5.17%, the others – 56.72%;
Bank Pekao	UniCredit S.p.A. (Italy) – 50.10%, Aberdeen Asset Management (Sweden) – 5.03%, the others – 44.87%
Bank Zachodni WBK	Banco Santander S.A. (Spain) – 75.19%, KBC Group NV and KBC Bank NV (Belgium) – 16.17%, the others – 8.64%
BRE Bank SA	Commerzbank AG (Germany) – 69.65%, ING OFE (Poland) – 6.67%, the others – 23.68%

<sup>1032</sup> Based on Paweł Tarnowski, 'Lista 500 po 20 latach' *Polityka.pl* (14 May 2013) <[www.lista500.polityka.pl/articles/show/55](http://www.lista500.polityka.pl/articles/show/55)> accessed 15 March 2014; and the companies' websites.

<sup>1033</sup> Based on Michał Naskręt, 'Struktura akcjonariatu polskich banków' *590x* (7 April 2013) <[www.590x.pl/2013/struktura-akcjonariatu-polskich-bankow/](http://www.590x.pl/2013/struktura-akcjonariatu-polskich-bankow/)> accessed 2 March 2014; and the banks' websites.

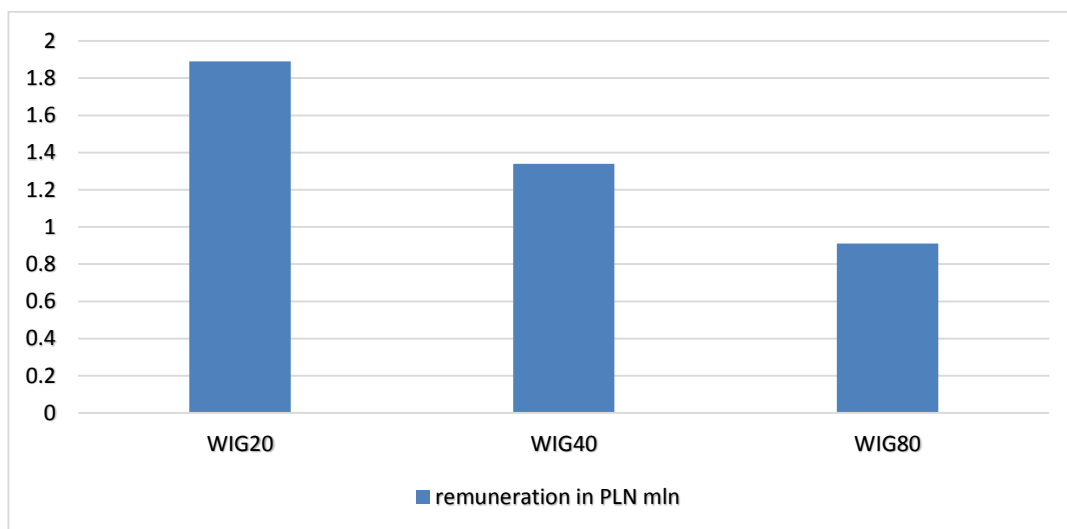
ING Bank Śląski	ING Bank N.V. (Holland) – 75.00%, OFE PZU „Złota Jesień” (Poland) – 5.10%, the others – 19.90%
Raiffeisen Bank	Raiffeisen Bank International AG (Austria) – 100%
Getin Noble Bank	LC Corp BV (Poland) – 38.98%, Leszek Czarnecki (Poland) – 10.24%, ING OFE (Poland) – 7.26%, Getin Holding (Poland) – 5.66%, the others – 37.86%
Bank Millennium	Millennium bcp (Portugal) – 65.51%, ING OFE (Poland) – 9.30%, the others – 25.19%
City Handlowy	Citibank Overseas Investment Corporation (US) – 75.00%, the others – 25.00%
Nordea Bank	Nordea Bank AB (Nordic countries) – 99.21%, the others – 0.79%

\* Status as at 1 May 2014.

\*\* OFE (otwarty fundusz emerytalny) – an open pension fund.

## Appendix 6

**Chart 1.** Average remuneration for members of management boards in 2012<sup>1034</sup>



<sup>1034</sup> PricewaterhouseCoopers Poland, 'Wynagrodzenia Zarządów Największych Spółek Giełdowych w 2012 Roku: Czy Giełda Popłaca?' (Warsaw, 24 June 2012) <[www.pwc.pl/pl/biuro-prasowe/assets/pwc\\_prezentacja\\_wynagrodzenia\\_czlonkow\\_zarzadu.pdf](http://www.pwc.pl/pl/biuro-prasowe/assets/pwc_prezentacja_wynagrodzenia_czlonkow_zarzadu.pdf)> accessed 24 May 2014.

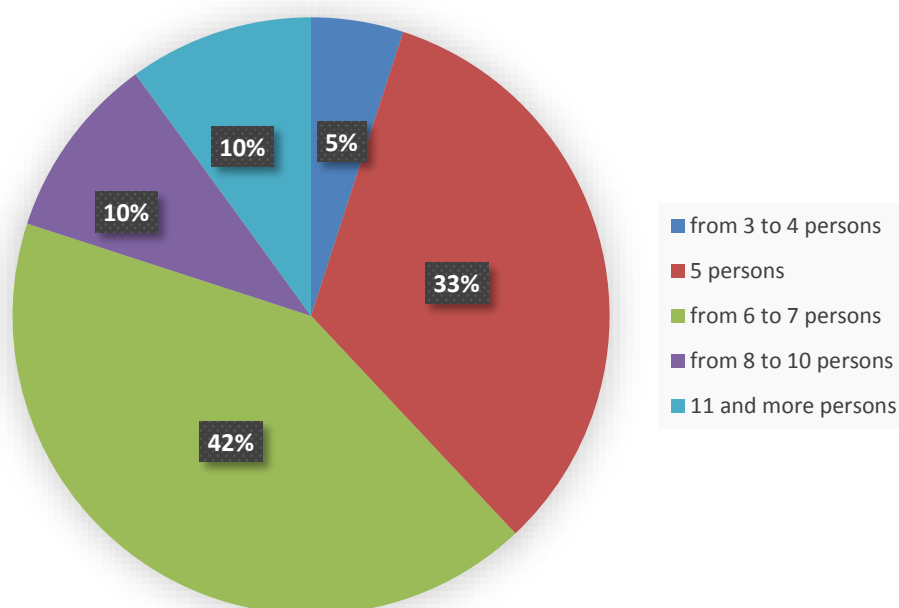
## Appendix 7

**Table 6.** Presence of committees on supervisory boards in Poland<sup>1035</sup>

	Audit committees	Remuneration committees	Strategy committees	Risk committee
In total	41,0%	20,5%	3,9%	1%
WIG20	94,7%	57,9%	42,1%	15%
WIG40	72%	52,8%	5,6%	0%
WIG80	59,2%	18,3%	1,4%	0%
The others	37,1%	13,9%	1,5%	0%

## Appendix 8

**Chart 2.** Size of supervisory boards in Poland<sup>1036</sup>



\* Research embraced all companies listed on the Warsaw Stock Exchange in March – April 2012.

<sup>1035</sup> PwC, 'Rady Nadzorcze 2013. Skuteczność (...)' (n 539).

<sup>1036</sup> Deloitte Poland, 'Raport „Współczesna Rada Nadzorcza 2012” (...)' (n 722).

## Appendix 9

### **Example of higher financial performance of companies with a larger number of women on their boards**

*'Statoil Hydro is one of Norway's largest companies. There are a number of legal requirements in Norway relating to members of the board which Statoil Hydro is subject to. There is a Norwegian legal requirement for at least 40 per cent of the board members to be female, which means that its board is more diverse than is common in most other countries. Also the companies' employees can be represented by three board members.*

Statoil Hydro was established in October 2007 following the merger between Statoil and Hydro's oil and gas activities. It is an international energy company primarily focused on upstream oil and gas operations, and operates in thirty-nine oil gas fields, whilst also being the world's largest operator in waters more than 100 metres deep.

In the case of Statoil Hydro, its Articles of Association provide for a board of ten members. Management is not represented on the board, which appoints the president and CEO. The board is subject to Norway's rules which state that all public companies in Norway are obliged to ensure that at least 40 per cent of their board directors are women. Of the ten members, four are female and six male, which meets the legal requirement of at least 40 per cent of the board being female.

The board has two subcommittees: an audit committee and a compensation (remuneration) committee. Three of the four female directors are members of either the audit committee or the compensation committee, and a female Director, Grace Reksten Skaugen, chairs the compensation committee. This is interesting as even where females are directors in other countries, such as in the UK, it is rare for them to be members of the key board committees, or indeed to chair such a committee. The fourth female Director, Lill-Heidi Bakkerud, represents the employees on the board. As well as Lill-Heidi Bakkerud, two male directors also represent the employees on the board.

Furthermore, there are another two members (both male in this case) who are in addition to the ten board members, and they are employee – elected observers and may attend board meetings but have no voting rights.

Statoil changed its organizational structure to reflect the ongoing globalization of Statoil, leverage the position on the Norway Continental Shelf, and simply internal inferences to support safe and efficient operations from 1 January 2011.

In terms of corporate governance features, the board still has 40 per cent female

composition and Marit Arnstad is now the Deputy Chair of the Board.<sup>1037</sup>

## Appendix 10

**Table 7.** Median\* annual remuneration for presidents and members of supervisory boards according to the size of companies (index WIG)<sup>1038</sup>

	President	Member	In total
WIG20	PLN150,000	PLN94,000	PLN95,000
WIG40	PLN96,000	PLN42,600	PLN48,500
WIG80	PLN64,131	PLN19,000	PLN42,000
The other companies	PLN30,000	PLN19,000	PLN23,000
In total	PLN41,454	PLN30,000	PLN36,000

\*Median annual remuneration – exactly 1/2 of members/presidents earn above the level of remuneration

## Appendix 11

Participation information sheet (in English)

# PARTICIPANT INFORMATION SHEET

## Section A: The Research Project

### 1. Title of project

Hybrid Corporate Governance: A Choice for Poland?

---

<sup>1037</sup> Mallin (n 27) 188.

<sup>1038</sup> PwC, 'Rady Nadzorcze 2013. Skuteczność (...)' (n 539).

**2. Purpose and value of study**

The purpose of the study is to investigate and critically reflect on the functioning of corporate governance in Poland, the US and the UK. The researcher also aims to determine what changes should be made to models of corporate governance in these countries. Your participation in the study might help the researcher reach some new conclusions in respect to the research topic. Thereafter they might be published in academic journals or discussed in academic conferences.

**3. Invitation to participate**

You are invited to participate in this study via semi-structured interviews at a location, chosen by you, that allows to protect your confidentiality. You have the right to choose the location. However, in order to meet the health and safety requirements of Anglia Ruskin University it should take place on business premises in normal hours.

**4. Who is organising the research?**

The sole organiser and researcher for this study is Katarzyna Anna Samól.

**5. What will happen to the results of the study?**

The results gathered at the interview will be transcribed and analysed for the use in the above student's PhD studies dissertation. Thereafter, the material collected by the researcher will either be destroyed or archived, according to your wishes.

**6. The sources of funding for the research**

The researcher will be funding the project.

**7. Contact for further information**

You can contact the researcher to discuss any matters regarding the project and the interview on the below details:

E-mail: [katarzyna.samol@student.anglia.ac.uk](mailto:katarzyna.samol@student.anglia.ac.uk)

**Section B: Your Participation in the Research Project**

**1. Why you have been invited to take part?**

Due to your broad knowledge of the research topic or topics related to the research topic, you are very important to the progress of the study.



**2. Whether you can refuse to take part**

You can refuse to take part at any time of the interviews or the whole project.

**3. Whether you can withdraw at any time, and how**

You can withdraw at any time by simply completing the withdrawal slip at the bottom of the consent form and forwarding it to the researcher.

**4. What will happen if you agree to take part?**

The first stage of the interview will consist of a discussion on matters concerning confidentiality and anonymity, the second stage will be the interview. If shown no objection by you, the interview will be tape recorded or conducted by e-mail correspondence, or Skype. If you feel uncomfortable with the questions being asked please inform the researcher at any time. There will be one interview, which should take no more than two/three hours. In case of interviewing by electronic correspondence, the researcher might contact you several times. However, it should not take longer than two/three hours in total to complete the interview.

**5. Are there any risks involved (eg side effects from taking part) and if so, what will be done to ensure your wellbeing/safety?**

See points 2, 3 and 5 in Section A, and points 3, 4 and 9 in Section B.

**6. Whether there are any special precautions you must take before, during or after taking part in the study**

Before you take part in the study you should read a participant consent form carefully and, if you agree with conditions set out in the form by the researcher, sign it, or email the researcher informing her that you give your permission to be interviewed on the basis of the received consent and according to the conditions set out in the participant information sheet. You are advised to attach the consent and the participant information sheet to your e-mail. In case of a face-to-face interview, a copy of the consent form should be given to you straight away. The copy of the consent, the participant information sheet and – if an interview was conducted by electronic correspondence – e-mails, proving that you took part in an interview related to the consent, will be necessary if you decide to enforce your rights in case of their violation.

**7. What will happen to any information/data/samples that are collected from you?**

Any material collected by the researcher will be analysed and used in the main body of the dissertation and therefore be destroyed or archived in accordance to your wishes.

**8. Are there any benefits from taking part?**

The benefits from taking part in this study will be your contribution to research on corporate governance.

**9. How will your participation in the project be kept confidential?**

**Anonymity** – throughout the research the researcher will not use your actual name if you wish to do so.

**Confidentiality** – all the tapes, transcripts, notes and any other material taken during the interview will be destroyed or archived in accordance to your wishes.

**YOU WILL BE GIVEN A COPY OF THIS TO KEEP,  
TOGETHER WITH A COPY OF YOUR CONSENT FORM**

Participation information sheet (in Polish)

## **ZAŁĄCZNIK: INFORMACJA DLA BIORĄCYCH UDZIAŁ W BADANACH**

### **Sekcja A: Projekt badawczy**

**1. Tytuł projektu**

Hybrid Corporate Governance: A Choice for Poland? [Hybrydalny Zarząd  
Przedsiębiorstwem: Opcja dla Polski?]

**2. Cel i znaczenie badań**

Celem badań jest prześledzenie i krytyczne odniesienie się do funkcjonowania ładu korporacyjnego w Polsce, Wielkiej Brytanii i Stanach Zjednoczonych. Prowadzący badania będzie również dążyć do ustalenia zmian, które powinny być wprowadzone do modelu

zarządu przedsiębiorstw w tych państwach. Twój udział w badaniach może pomóc w dotarciu do nowych przemyśleń odnośnie tematu badań.

Następnie Pana/Pani refleksje mogą zostać umieszczone w rozprawie doktorskiej, opublikowane w czasopismach prawniczych i dyskutowane na konferencjach naukowych.

**3. Zaproszenie do udziału w badaniach**

Jest Pan/Pani zaproszony/-a do udziału w badaniach poprzez udział w wywiadzie – rozmowie, który odbędzie się w miejscu wybranym przez Pana/Panią, i pozwoli na zachowanie poufności. Ma Pan/Pani prawo wskazać takie miejsce, które ze względu na wymogi bezpieczeństwa znajdujące się w regulaminie Anglia Ruskin University, powinno być ulokowane w budynku użyteczności publicznej w godzinach pracy.

**4. Kto jest organizatorem badań?**

Jedynym organizatorem i zarazem prowadzącym badania w tym projekcie jest Pani Katarzyna Anna Samól.

**5. Co stanie się z informacjami zebranymi podczas badań?**

Zebrane informacje zostaną opracowane na użytek wspomnianej wyżej rozprawy doktorskiej. Następnie, materiał zebrany przez prowadzącego badania zostanie zniszczony lub zarchiwizowany zgodnie z Pana/Pani życzeniem.

**6. Źródła finansowania badań**

Prowadzący badania pokrywa całkowity koszt badań.

**7. Dane kontaktowy w celu otrzymania dalszych informacji**

W celu otrzymania dalszych informacji dotyczących projektu i wywiadu, jest Pan/Pani proszony/-a o napisanie wiadomości na następujący adres e-mailowy:

katarzyna.samol@student.anglia.ac.uk or ksamol1@o2.pl

**Sekcja B: Pana/Pani udziału w projekcie badawczym**

**1. O powodach zaproszenia Pan/Pani do wzięcia udziału w projekcie**

Z powodu Pana/Pani rozległej wiedzy na temat projektu badawczego lub znajomości tematów związanych z tym projektem. Pana/Pani udział w badaniach jest istotny dla usystematyzowania i rozwoju wiedzy dotyczącej poruszanego zagadnienia.

**2. O możliwości odmówienia uczestnictwa w projekcie**

Posiada Pan/Pani pełne prawo odmówienia uczestnictwa w dalszych etapach projektu (na każdym z jego etapów).

**3. O możliwości i sposobie wycofania się z projektu na każdym jego etapie**

Posiada Pan/Pani pełne prawo wycofania się z projektu poprzez uzupełnienie oświadczenia o rezygnacji z uczestnictwa w programie. Oświadczenie znajduje się na ostatniej stronie dokumentu - zgody o wzięcie udziału w badaniach. Deklaracja powinna zostać przekazana prowadzącemu badania z jednoczesnym poinformowaniem jego/jej, za pośrednictwem poczty elektronicznej, o wycofaniu się z projektu.

**4. O tym co nastąpi, kiedy Pan/Pani wyrazi zgodę na udział w badaniu**

Na początku zostaną objaśnione Pani/Panu kwestie dotyczące poufności udziału w badaniach. Następnie odbędzie się wywiad na wskazany powyżej temat. Jeżeli nie wyrazi Pan/Pani sprzeciwu, wywiad będzie nagrywany lub prowadzony drogą elektroniczną (poczta e-mailowa lub Skype). Jeśli pytania sprawią Panu/Pani kłopot, proszę poinformować o tym prowadzącego badania. Odbędzie się jeden wywiad, który potrwa nie dłużej niż dwie/trzy godziny. W przypadku prowadzenia wywiadu drogą elektroniczną, prowadzący badania może skontaktować się z Panem/Panią kilka razy. Jednakże całkowite zakończenie wywiadu nie powinno potrwać więcej niż dwie/trzy godziny.

**5. O istnieniu ryzyka związanego z udziałem w badaniach (np. efekty uboczne), i środkach podjętych w celu jego wyeliminowania i zapewnienia Panu/Pani bezpieczeństwa**

Patrz punkty 2., 3. i 5. w Sekcji A, a także punkty 3., 4. i 9. w Sekcji B.

**6. O środkach ostrożności, które Pan/Pani powinien/-a podjąć przed wzięciem udziału w badaniach, w trakcie badań i po ich zakończeniu**

Przed wzięciem udziału w badaniach powinien/-a Pan/Pani uważnie przeczytać zgodę na udział w projekcie, i jeśli zgadza się Pan/Pani z warunkami przedstawionymi przez prowadzącego badania, podpisać ją lub poinformować prowadzącego badania drogą e-mailową o wyrażeniu zgody na udział w wywiadzie. Jednocześnie prowadzący badania prosi Pana/Panią o dołączenie zgody i załącznika do wiadomości e-mail. W przypadku wywiadu prowadzonego metodą 'face to face', kopia zgody powinna być Panu/Pani wręczona natychmiast po jej podpisaniu. Kopia zgody, załącznik zawierający informacje o badaniach i warunkach udziału w badaniach, a także – jeśli wywiad prowadzony jest drogą elektroniczną – wiadomości e-mailowe, będą konieczne w celu dochodzenia swoich praw na wypadek ich

naruszenia.

7. **Co się stanie z informacjami/danymi statystycznymi/próbkami dostarczonymi przez Pana/Panią?**

Materiały zebrane przez prowadzącego badania zostaną przez niego przeanalizowane i najprawdopodobniej użyte w rozprawie doktorskiej, a następnie zniszczone lub zarchiwizowane zgodnie z Pana/Pani życzeniem.

8. **Czy są jakieś korzyści z wzięcia udziału w badaniach?**

Nie ma korzyści materialnych z udziału w badaniach. Jedynym zyskiem dla uczestnika projektu jest satysfakcja z udziału w naukowym projekcie.

9. **W jaki sposób Pana/Pani udział w badaniach zostanie utajniony?**

**Anonimowość** – prowadzący badania nie ujawni (włączając w to rozprawę doktorską) Pana/Pani imienia i nazwiska, a także danych personalnych, które pozwoliłyby na Pana/Pani identyfikację. Może Pan/Pani jednak zażyczyć sobie jawności danych.

**Poufność** – wszystkie taśmy, notatki z wywiadów, a także inne materiały zostaną zniszczone podczas wywiadów lub zarchiwizowane zgodnie z Pana/Pani życzeniem.

**OTRZYMA PAN/PANI KOPIĘ ZAŁĄCZNIKA, WRAZ Z KOPIĄ ZGODY NA UDZIAŁ W BADANIACH**

## **Appendix 12**

**Consent for Participant (in English)**

# **CONSENT FOR PARTICIPANTS**

NAME OF PARTICIPANT:

Title of the project:

Hybrid Corporate Governance: A Choice for Poland?

Main investigator and contact details: Katarzyna Anna Samól

E-mail: katarzyna.samol@anglia.student.ac.uk

Members of the research team: Katarzyna Anna Samól

- 1) I agree to take part in the above research. I have read the Participant Information Sheet that is attached to this form. I understand what my role will be in this research, and all my questions have been answered to my satisfaction.
- 2) I understand that I am free to withdraw from the research at any time, for any reason and without prejudice.
- 3) I have been informed that the confidentiality of the information I provide will be safeguarded.
- 4) I am free to ask any questions at any time before and during the study.
- 5) I have been provided with a copy of this form and the Participant Information Sheet.

Data Protection: I hereby give consent to the University<sup>1039</sup> for the collection, storage and processing of my personal data in accordance with the Personal Data Protection Act dated 29.08.1997 (uniform text: Journal of Laws of the Republic of Poland 2002 No 101, item 926 with further amendments). I agree to the collection, storage and processing of such data for any purposes connected with the Research Project as outlined to me.

Name of participant (print) \_\_\_\_\_ Signed \_\_\_\_\_

Date \_\_\_\_\_

YOU WILL BE GIVEN A COPY OF THIS FORM TO KEEP

-----

If you wish to withdraw from the research, please complete the form below and return it to the main investigator named above.

Title of Project: Hybrid Corporate Governance: A Choice for Poland?

**I WISH TO WITHDRAW FROM THIS STUDY**

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

---

<sup>1039</sup> 'The University' includes Anglia Ruskin University and its partner colleges.

## ZGODA UCZESTNIKA NA WZIĘCIE UDZIAŁU W BADANIACH

**Imię i nazwisko uczestnika:**

**Tytuł projektu:** Hybrid Corporate Governance: A Choice for Poland? [Hybrydalny Corporate Governance: Opcja dla Polski?]

**Główny prowadzący badania i jego dane kontaktowe:** Katarzyna Anna Samól

E-mail: katarzyna.samol@anglia.student.ac.uk; ksamol1@o2.pl

**Prowadzący badania:** Katarzyna Anna Samól

1. Wyrażam zgodę na wzięcie udziału w powyższych badaniach. Zaznajomiłem/łam się z informacją o udziale w badaniach, załączonym do tego formularza. Rozumiem jaka będzie moja w nich rola, i otrzymałem odpowiedź na wszystkie nurtujące mnie pytania, dotyczące prowadzenia powyższych badań.
2. Rozumiem, że mogę zrezygnować z udziału w badaniach w każdym czasie i bez podawania powodu.
3. Zostałem/-łam poinformowany/na, że poufność informacji dostarczonych przeze mnie będzie chroniona.
4. Mam pełne prawo zadawać pytania przed i w czasie badań.
5. Otrzymałem/-łam kopię zgody i załącznik z informacją o udziale w powyższych badaniach.

Ochrona danych: Udzielam zgody Uniwersytetowi<sup>1040</sup> na kolekcjonowanie, przechowywanie i przetwarzanie moich danych osobowych dla potrzeb niezbędnych do realizacji powyższego projektu (zgodnie z Ustawą z dnia 29.08.1997 roku o Ochronie Danych Osobowych; tekst jednolity: Dz. U. z 2002 r. Nr 101, poz. 926 ze zm.).

**Imię i nazwisko uczestnika (drukiem):**

---

---

<sup>1040</sup> "Uniwersytet" oznacza Anglia Ruskin University i jego filie.

Data: \_\_\_\_\_

Podpis: \_\_\_\_\_

**OTRZYMA PAN/PANI KOPIĘ FORMULARZA NA PRZECHOWANIE**

---

-

Jeżeli życzy sobie Pan/Pani zrezygnować z udziału w badaniach, proszę o uzupełnienie poniższego formularza i zwrócenie go osobie prowadzącej badania.

**Tytuł projektu:** Hybrid Corporate Governance: A Choice for Poland?

**Imię i nazwisko (drukiem):** \_\_\_\_\_

**OŚWIADCZAM, ŻE CHCĘ WYCOFAĆ SIĘ Z PROWADZONYCH BADAŃ.**

**Data:** \_\_\_\_\_

**Podpis:** \_\_\_\_\_